

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SHARPLESS SEPARATOR COMPANY,
a Corporation,

Plaintiff in Error,

vs.

W. W. SKINNER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JUL 3 - 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SHARPLESS SEPARATOR COMPANY,
a Corporation,

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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable
OSCAR A. TRIPPET, Judge of the Above-
entitled Court, GREETING:

Because in the record and proceedings, as also in
the giving, making and rendition, entry and filing of
the final judgment in that certain cause in the above-
entitled court, before you, between the above-named
plaintiff and the above-named defendant, manifest
error hath happened to the great prejudice and dam-
age of said defendant corporation, as is stated and
appears by the petition herein:

We being willing that error, if any hath been,
should be duly corrected, and full and speedy justice
done to the party defendant aforesaid, in this behalf
do command you, if justice be therein given, that
then under your seal, distinctly and openly, you send
the record and proceedings aforesaid, with all things

concerning the same, to the [5*] Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city and county of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in the said circuit, on the 26th day of March, A. D. 1917, that the said records and proceedings being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 27th day of February, A. D. 1917.

ATTEST my hand and the seal of the above-entitled court at the Clerk's office thereof, at the city and county of Los Angeles, State of California, on the day and year last above written.

[Seal]

WILLIAM M. VAN DYKE,
Clerk of Said Court.
By Chas. N. Williams,
Deputy Clerk.

Allowed this 27th day of February, A. D. 1917.

OSCAR A. TRIPPET,
Judge of Said Court.

I hereby certify that a copy of the within writ of error was on the 27th day of February, 1917, lodged in the Clerk's office for the Southern Division of the

*Page-number appearing at foot of page of original certified Transcript
of Record.

Southern District of California, for the said defendant in error.

WILLIAM M. VAN DYKE,
Clerk United States District Court, Southern District of California.

By Chas. N. Williams,
Deputy Clerk. [6]

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Writ of Error. Filed Feb. 27, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Citation.

United States of America,—ss.

The President of the United States, to the Above-named Plaintiff and to His Attorneys, GREETING:

You, and each of you, are hereby cited and admon-

ished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the above-named court, wherein said, The Sharples Separator Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the final judgment in said writ of error mentioned, and from which said writ of error has been allowed, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of [8] America, this 27th day of Feb., A. D. 1917, and of the independence of the United States, the 1—.

OSCAR A. TRIPPEL,
Judge of the Above-entitled Court.

Attest: WILLIAM M. VAN DYKE,
Clerk of the Above-entitled Court.

Deputy Clerk.

Receipt of a copy of the foregoing Citation is hereby admitted this 28th day of Feb., A. D. 1917.

PHIL D. SWING,

Attorneys for Defendant in Error. [9]

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a

Corporation, Defendant. Citation. Filed Mar. 1, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [10]

Names and Addresses of Attorneys.

For Plaintiff in Error:

BICKSLER, SMITH & PARKE, Esqs., 829
Citizens National Bank Building, Fifth &
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J. J. DUNNE, Esq., Claus Spreckels Building,
San Francisco, California.

For Defendant in Error:

PHIL D. SWING, Esq., Suite 6, 7 and 8, Security
Savings Bank Building, El Centro,
California. [11]

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COMPANY,
a Corporation,

Defendants. [12].

*In the Superior Court in and for the County of
Imperial, State of California.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR CO., a Corporation,
and EDGAR BROS. COMPANY, a Corporation,

Defendant.

ESHLEMAN & SWING, Attorneys for Plaintiff.

Summons.

The People of the State of California Send Greetings
To The Sharples Separator Company, a Corporation,
and Edgar Bros. Company, a Corporation, Defendants:

YOU ARE HEREBY DIRECTED TO APPEAR
and answer the complaint in an action entitled as
above, brought against you in the Superior Court of
the County of Imperial, State of California, within
ten days after the service on you—of this summons—
if served within this county, or within thirty days if
served elsewhere.

And you are hereby notified that unless you appear
and answer as above required, the said plaintiff will
take judgment for any money or damages demanded
in the complaint, as arising upon contract, or he will
apply to the Court for any other relief demanded in
the complaint.

Given under my hand and the seal of the Superior

Court of the County of Imperial, State of California,
this 6th day of July, A. D. 1915.

[Seal]

M. S. COOK,
Clerk. [13].

*In the Superior Court of the State of California, in
and for the County of Imperial.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Complaint.

Comes now the plaintiff above named and for cause
of action against the above-named defendants, al-
leges:

I.

The plaintiff is informed and believes and there-
fore alleges the fact to be that The Sharples Sep-
arator Company is a corporation, organized and ex-
isting under and by virtue of the laws of the State of
Pennsylvania, and having its principal place of
business at West Chester, Pennsylvania. That
said The Sharples Separator Company has not filed
the certified copy of its articles of incorporation in
the office of the Secretary of the State of California,
nor designated a person residing within the State of
California, upon whom process, issued by authority
of or under the laws of the State of California, may

be served. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the transaction of business within the State of California. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the manufacture and sale of cream separators and mechanical milkers.

II.

That Edgar Bros. Company is a corporation *and* existing under and by virtue of the laws of the State of California, and having its principal place of business at the City of Imperial, [14] County of Imperial, State of California, and at all times herein mentioned has been and now is engaged in the sale of farm and dairy tools, implements and machinery, including the manufactured products of the said The Sharples Separator Company.

III.

The plaintiff at all times herein mentioned was a farmer and dairyman within the County of Imperial, State of California, and at all times herein mentioned has owned, cared for, and milked and now does own, care for, and milk a herd of dairy cows as defendants at all times herein mentioned well know.

IV.

That on or about the 3d day of January, 1914, at El Centro in the County of Imperial, State of California, and while plaintiff was the owner as aforesaid of a herd of dairy cows, consisting of about ninety (90) head, the defendants sold and delivered to the plaintiff a certain mechanical milker known as the SHARPLES MECHANICAL MILKER, consisting of four milker units and then and there war-

ranted the same to be in all respects fit and proper for the said use of milking plaintiff's said cows and especially warranted that when said SHARPLES MECHANICAL MILKER has been installed on plaintiff's ranch by defendants, it could safely be used for milking plaintiff's said cows, and that the use therof in milking said cows would not in any way injure said cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendant's instructions.

V.

That plaintiff had no information or knowledge regarding said mechanical milker or any mechanical milker, other than the representations and warranties of defendants and had no means to and was unable to ascertain the truth or falsity of defendant's said representations and warranties before making said purchase and [15] plaintiff believed the said representations of defendants and relied upon their said warranties and made said purchase solely by reason of said representations and warranties.

VI.

That on or about the 5th day of February, 1914, defendants installed said The Sharples Mechanical Milker for plaintiff on his ranch near El Centro, said County of Imperial, and declared to plaintiff that the said mechanical milker was then and there completely and properly installed and that he could thereafter safely use and operate it for milking plaintiff's said cows and that if operated and cared for in accordance with the defendants' instructions, the same would not in any way injure plaintiff's said

cows nor decrease the amount of milk said cows would give.

VII.

That thereafter plaintiff began in good faith to use the said mechanical milker for milking his said cows, and at all times operated and cared for said mechanical milker in strict conformity to and in compliance with all of defendants' instructions but said mechanical milker was not then and there nor has it since been nor is it now fit or proper to be used for milking plaintiff's said cows but the use thereof for milking plaintiff's said cows bruised and injured the teats, udders, and bag of many of plaintiff's said cows and greatly lessened the amount of milk given by all of said cows. That as soon as plaintiff discovered that the said milker was injuring his said cows, he discontinued the use thereof.

VIII.

That on or about the 30th day of May, 1914, plaintiff notified defendants that he had in good faith endeavored to use the said mechanical milker for the purpose of milking his said cows but that said milker was wholly insufficient for said purpose and that it did not in any respect comply with their warranties and offered to return the same. [16].

IX.

That defendants thereupon repeated all their former representations and warranties and asserted that the said mechanical milker had not been given a fair trial and insisted that defendants be permitted to operate the same upon plaintiff's cows and again represented the said mechanical milker properly operated would not in any way injure

plaintiff's said cows and on or about the 25 day of June, 1914, defendants, themselves, began to operate said mechanical milker in milking plaintiff's said cows on his ranch in Imperial County and continued to so operate it for a period of about two weeks thereafter, during which time said mechanical milker was under the defendant's sole care, custody and control. That defendants were wholly unable to operate said mechanical milker so as not to injure plaintiff's said cows but on the contrary, the said mechanical milker, while being operated by defendants as aforesaid in milking plaintiff's said cows, did greatly injure said cows and totally and permanently ruining many of them for any and all purposes whatever. That after their unsuccessful attempt to operate said milker, to wit, on or about the 7th day of July, 1914, defendants abandoned their said attempt to make said milker work.

X.

That after defendants discontinued operating said mechanical milker, as aforesaid, plaintiff did not again attempt to use the same but again notified defendants that the same was useless and worthless and offered to return the same to the defendants and demanded that defendants return to him the purchase price thereof and damages for the injury done his said cows by the operation of said milker as aforesaid.

XI.

That on or about the 20th day of October, 1914, defendants again asserted that that said mechanical milker was a fit and [17] proper machine for

milking plaintiff's cows and represented that said milker could be successfully operated without injury to plaintiff's cows and insisted that they be permitted another trial thereof upon plaintiff's said cows, and again represented and warranted that the said mechanical milker would not in any way injure plaintiff's said cows and agreed to pay plaintiff all damages caused his said cows by said mechanical milker. That plaintiff consented to another trial and on the 20th day of October, 1914, defendants again began the operation of said mechanical milker on plaintiff's cows and attempted to milk plaintiff's said cows therewith. That from the said 20th day of October, 1914, to the 18th day of December, 1914, defendants continued to operate said milker upon plaintiff's said cows and during all that period defendants had the sole care, custody, and control of said machine. That said mechanical milker while being operated as aforesaid by said defendants, greatly injured plaintiff's said cows by bruising and disceasing the teats, udders and bags of said cows and totally and permanently ruining many of said cows for dairy purposes and for all purposes whatever. That on the 18th day of December, 1914, defendants discontinued operating said milker and the same has not been used since.

XII.

That at all times herein mentioned said mechanical milker has been and now is wholly and entirely useless and worthless and of no value whatever. That on or about the 18th day of December, 1914, plaintiff after a full and fair trial of said milker as

aforesaid notified defendants of the insufficiency of the said milker to do the things which defendants had represented and warranted it could do and would do, and offered to return the said milker to the defendants and demanded that defendants return him the purchase price of said milker and also that defendants pay him for the damages and loss to his said cows. [18]

XIII.

That before said Sharples Mechanical Milker was used on plaintiff's said cows, they were a valuable herd of *heathly*, well bred dairy cows free from disease. That as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid, two (X) of his cows died from the injurious effects upon them of said milker to platiniff's damage in the sum of Three Hundred (300) Dollars. Five (5) were totally and permanently ruined for all purposes to plaintiff's damage in the sum of Six Hundred Seventy-five (675) Dollars. Ten (10) were totally and permanently ruined for dairy purposes to plaintiff's damage in the sum of Seven Hundred and Thirty (730) Dollars. Ten (10) were injured, each by the loss of the use of one or more teats to plaintiff's damage in the sum of Three Hundred (300) Dollars, making plaintiff's total damage by reason of the injury to his said cows in the sum of Two Thousand and Five (2005) Dollars.

XIV.

That as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid, plaintiff has suffered a loss of butter fat re-

ceived from said cows, amounting to Six Thousand (6000) lbs. to his damage in the sum of Fifteen Hundred (1500) Dollars.

XV.

That plaintiff paid defendants in the purchase and installation of said mechanical milker the sum of One Thousand and Seven (1007) Dollars.

XVI.

That defendants have paid plaintiff no part of said sum of Forty-five Hundred Twelve (4512) Dollars but the *whoe* sum thereof is now due, owing and unpaid. [19]

WHEREFORE, plaintiff prays judgement against defendants for the sum of Forty-five Hundred Twelve and no/100 (4512) Dollars and for costs of suit incurred herein.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

State of California,
County of Imperial,—ss.

W. W. Skinner, being duly sworn, deposes and says: That he is the plaintiff in the foregoing and above-entitled action, that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things stated on his information and belief, and that as to those matters and things he believes it to be true.

W. W. SKINNER.

Subscribed and sworn to before me this 3d day of July, 1915.

PHIL D. SWING,

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: Filed July 6, 1915. M. S. Cook,
County Clerk. [20]

*In the Superior Court of the State of California, in
and for the County of Imperial.*

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Petition for Removal to United States District
Court.**

To the Honorable the Superior Court of the State
of California, in and for the County of Im-
perial.

Now comes The Sharples Separator Company, a
corporation, one of the defendants in the above-en-
titled cause, and files this its petition for the re-
moval of said cause from the aforesaid Superior
Court, in which it is now pending, to the District
Court of the United States, in and for the Southern
District of California, held at the City of Los An-
geles, in said district and state.

Petitioner would show unto your Honorable Court:

1. That this cause was filed in your Honorable Court on the 6th day of July, 1915, and that the time to plead, answer or demur to the same has not expired under the laws of this State, in such cases made and provided.
2. That the suit is one of a civil nature at common law, of which the District Courts of the United States have original jurisdiction, to wit, said suit is brought to recover a sum in [21] excess of Three Thousand Dollars (\$3,000), exclusive of interest and costs.
3. That the controversy herein is separable and is between citizens of this state and of a foreign state; that the plaintiff was at the time of the commencement of this suit, and still is, a citizen of the State of California, residing in the County of Imperial, in said State; and that your petitioner The Sharbles Separator Company, was, at the time of the commencement of this suit, and now is, a corporation organized under the laws of the State of Pennsylvania, with its principal place of business at West Chester, in said State; and that your petitioner desires to remove this suit into the District Court of the United States to be held in the Southern District of California, Southern Division.
4. Your petitioner further shows that the cause of action that the plaintiff has alleged in his complaint herein against the two defendants, your petitioner and Edgar Bros. Company, a corporation, is for damages arising from the sale and delivery to

plaintiff of a certain mechanical milker known as the "Sharples Mechanical Milker"; and that plaintiff alleges that the defendants warranted the same to be in all respects fit and proper for the use of milking cows and especially warranted that when said "Sharples Mechanical Milker" had been installed on plaintiff's ranch by defendants it could safely be used for milking plaintiff's cows, and that the use thereof in milking said cows would not in any way injure cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendants' instructions; and that plaintiff alleges that defendants were unable to operate said mechanical milker so as not to injure [22] plaintiff's cows, but on the contrary, while the same was being operated by defendants plaintiff's cows were injured, and asks for judgment against defendants in the sum of Four Thousand Five Hundred Twelve Dollars (\$4512) and costs.

5. That the said "Sharples Mechanical Milker" referred to in the complaint was sold by your petitioner to the plaintiff and that Edgar Bros. Company, also joined as a defendant herein, was paid a commission for the sale of said machine and was acting at all times herein simply and solely as agent for your petitioner; and that the defendant Edgar Bros. Company is and was fraudulently and improperly joined as a party defendant for the sole purpose of defeating the right of petitioner to remove this cause to the United States District Court; and that said defendant is not in any way interested in

the controversy set forth in the complaint herein.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court as provided by law, and as in duty bound your petitioner will ever pray.

THE SHARPLES SEPARATOR COMPANY,
By WILLARD P. SMITH,
B. B. BLAKE,
Its Attorneys. [23]

State of California,

City and County of San Francisco,—ss.

F. A. Frank, being duly sworn, deposes and says:

That he is the managing agent of The Sharples Separator Company, the petitioner herein named, and has knowledge of the facts set forth in said petition; that he has read the above and foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters he believes it to be true.

That the reason why this verification is not made by The Sharples Separator Company is that it is a Pennsylvania corporation and none of its officers are or reside in the State of California.

F. A. FRANK.

Subscribed and sworn to before me this 10th day of September, 1915.

[Seal] J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed September 13, 1915. M. S. Cook, County Clerk. [24]

*In the Superior Court of the State of California,
in and for Imperial County.*

#31694-15.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Sharples Separator Co., a corporation, one of the defendants, as principal, and United States Fidelity & Guaranty Company, a corporation duly organized and existing and doing business under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the plaintiff in the above-entitled cause, in the sum of Five Hundred Dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made, the undersigned bind

themselves, jointly and severally, firmly by these presents:

THE CONDITION of this obligation is such, that WHEREAS, Sharpless Separator Co., a corporation, one of the defendants as aforesaid, has applied by petition to the said Superior Court for the removal of the said action to the District Court of the United States for the Southern District of California, pursuant to the Act of Congress in such case made and provided;

NOW, THEREFORE, if said defendant shall enter in said District Court of the United States for the District aforesaid, within thirty days from date of the filing of the petition a certified copy of the record in said action, and shall pay all costs that may be awarded therein by said District Court if said court shall hold that said suit was wrongfully or improperly [25] removed therefrom, then this obligation shall be void; otherwise shall be and remain in full force and effect.

THE SHARPLES SEPARATOR COMPANY,

By W. P. SMITH,

Attorney in Fact.

UNITED STATES FIDELITY & GUARANTY COMPANY,

(Corporate Seal)

H. V. D.

By BORLAND & JOHNS,

Attorneys in Fact.

By W. S. ALEXANDER.

State of California,

City and County of San Francisco,—ss.

On this 7th day of September, in the year one

thousand nine hundred and 15, before me, M. J. Cleveland, a notary public in and for the city and county of San Francisco, personally appeared H. V. D. Johns and W. S. Alexander known to me to be the persons whose names are subscribed to the within instrument as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Notarial Seal] M. J. CLEVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed September 13, 1915. M. S.
Cook, County Clerk. [26]

*In the Superior Court of the State of California, in
and for the County of Imperial.*

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Notice of Petition and Bond for Order of Removal.
To the Plaintiff Above Named and to Messrs. Eshle-

man & Swing, his attorneys:

Please take notice that The Sharples Separator

Company, one of the defendants in the above-entitled cause, will on the 17th day of September, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Southern District of California in accordance with the petition and bond of defendants, copies of which are hereto attached.

Dated September 10th, 1915.

WILLARD P. SMITH,
B. B. BLAKE,

Attorneys for Defendant The Sharples Separator Company.

[Endorsed]: Filed September 13, 1915. M. S. Cook, County Clerk. G. H. Mathews, Deputy Clerk.

Due service of the within notice of filing petition and receipt of a copy of petition and bond is hereby admitted this 13th day of September, 1915.

ESHLEMAN & SWING,
Attorneys for Plaintiff. [27]

*In the Superior Court of the State of California, in
and for the County of Imperial.*

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Order of Removal.

This cause coming on for hearing upon petition and bond of the defendant The Sharpless Separator Company for an order transferring this cause to the United States District Court for the Southern District of California, Southern Division, and it appearing to the Court that the defendant The Sharples Separator Company has filed its petition for such removal in due form of law, and that the said defendant has filed its bond duly conditioned, with good and sufficient sureties, as provided by law, and that said defendant has given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court.

Now, therefore, said petition and bond are hereby accepted and it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States District Court for the Southern District of California, Southern Division, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court, this 20th day of September, 1915.

FRANKLIN J. COLE,
Judge of the Superior Court.

[Endorsed]: Filed September 20, 1915. M. S. Cook, County Clerk. G. H. Matthews, Deputy.

[28]

Sep. 21, 1915,

Return of summons has not been made.

_____,
Clerk. [29]*In the Superior Court of the State of California, in
and for the County of Imperial.*

No. 2489.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Certificate of Clerk to Transcript on Removal from
Superior Court.**State of California,
County of Imperial,—ss.

I, M. S. Cook, County Clerk of said county of Imperial, and ex-officio clerk of the Superior Court in and for said county, hereby certify the above and foregoing to be a full, true and correct copy of the record, and the whole thereof, in the above-entitled suit heretofore pending in said Superior Court, being the suit numbered No. 2489, wherein W. W. Skinner is plaintiff and The Sharpless Separator Company, a corporation, and Edgar Bros. Company, a corporation, are defendants, said record consisting of the complaint, filed by said plaintiff in said

suit on the 6th day of July, 1915; the summons and return thereon, filed in said suit on the —— day of —————, 1915, the petition for removal of said suit to the United States District Court, filed by the defendant The Sharples Separator Company in said suit on the 13th day of September, 1915, the bond for removal, the notice of petition and bond, and the order of removal of said suit to said United States District Court, entered of record in said suit on the 20th day of September, 1915, all as appears on the files and of record in my office.

Witness my hand and official seal this 21st day of September, A. D. 1915.

[Seal]

M. S. COOK,
County Clerk.

D. N. Thompson,
Deputy Clerk. [30]

[Endorsed]: No. 413—Civ. U. S. District Court, Southern District of California, Southern Division. W. W. Skinner v. The Sharples Separator Co. et al. Cert. Transcript on Removal from Superior Court Imperial Co. Filed Sep. 25, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [31]

*In the District Court of the United States, for the
Southern District of California.*

No. ——.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants.

**Notice of Motion to Remand Cause to the Superior
Court of the State of California.**

To the Sharples Separator Company, a Corporation, Defendant Above Named, and to Willard P. Smith and B. B. Blake, Its Attorneys:

You and each of you will please take notice that the plaintiff above named will on Monday the 18th day of October, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled court to remand the above-entitled cause to the Superior Court of the State of California in and for the county of Imperial. Said Motion will be made and based on the following grounds:

I.

That the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of the said District Court.

II.

That it does not appear from the records and papers on file in the said District Court that there

is a controversy which is wholly between citizens or residents of different States which can be tried and which can wholly be determined between them without [32] involving necessarily a trial of the whole case as to all defendants.

III.

That the defendants are not all residents or citizens of States other than California and it does not appear that the parties defendant to said suit were or have been wrongfully joined as such.

IV.

That the defendant, the Edgar Bros. Company, is a proper and necessary party defendant and that said defendant, Edgar Bros. Company, is a resident of the State of California.

V.

That the controversy herein is not separable.

On the hearing of said motion plaintiff will rely on and read in evidence.

1. The transcript and record on file in said District Court in said cause.

2. The answer of the plaintiff to the petition of The Sharples Separator Company for a removal, served herewith.

3. Affidavit of W. W. Skinner.

Dated this 7th day of October, 1915.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

[Endorsed]: 413—Civ. In the District Court of the United States for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation, and Edgar

Bros., a Corporation, Defendants. Notice of Motion to Remand Cause to the Superior Court of the State of California. Recd. copy of the within notice this 11th day of Oct. 1915. Willard P. Smith, B. B. Blake, Atty. for Deft., The Sharples Separator Company. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Eshleman & Swing, Attorneys for Plaintiff. [33]

In the District Court of the United States, for the Southern District of California.

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants.

Demurrer to Defendants' Petition for Removal.

Comes now the plaintiff above-named and demurs to defendant's The Sharples Separator Company's Petition for Removal on the ground that the same does not state facts sufficient to justify the removal of the same.

WHEREFORE plaintiff prays that said cause by remanded to the Superior Court of the State of California in and for the county of Imperial.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

[Endorsed]: 413—Civ. In the District Court of the United States for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, and Edgar Bros. Company, a Corporation, Defendants. Demurrer to Defendant's Petition for Removal. Recd. copy of within Demurrer this 11th day of Oct. 1915. Willard P. Smith, B. B. Blake, Attorneys for Deft., The Sharples Separator Company. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Eshleman & Swing, Attorneys for Plaintiff. [34]

*In the District Court of the United States, for the
Southern District of California.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants.

Answer to Petition for Removal.

Comes now W. W. Skinner, plaintiff above named, and for answer to the petition for removal denies, alleges, and admits as follows:

I.

Denies that the controversy herein is separable and alleges that the injury complained of was the result of the joint acts of both of said defendants and that the injury suffered by the plaintiff as the

result of the acts of defendant, Edgar Bros Company, a corporation, cannot be ascertained or estimated separately and apart from the injury suffered by plaintiff as the result of the acts of defendant, The Sharples Separator Company, a corporation.

II.

Denies that the Sharples Mechanical Milker referred to in plaintiff's complaint was sold to plaintiff by the petitioner herein, The Sharples Separator Company.

III.

That as to the allegations contained in paragraph 5 of said Petition that Edgar Bros. Company was paid a commission for the sale of said machines, plaintiff has no knowledge, information [35] or belief on the subject sufficient to enable him to answer the same and therefor denies that the Edgar Bros. Company was paid a commission for the sale of said machines.

IV.

Denies that Edgar Bros. Company was acting at all times herein simply and solely or simply or solely as an Agent for the petitioner, The Sharples Separator Company, a corporation.

V.

Denies that the defendant, Edgar Bros. Company, is and was or is or was fraudulently and improperly or fraudulently or improperly joined as a party defendant; denies that said Edgar Bros. Company was united as a party defendant for the sole purpose of defeating the right of petitioner to remove this cause to United States District Court but alleges that said

defendant Edgar Bros. Company is a necessary and proper party defendant.

VI.

Denies that said defendant, Edgar Bros. Company, is not in any way interested in the controversy set forth in the complaint herein but alleges that defendant, the Edgar Bros. Company, is interested in the controversy set forth in the complaint and is jointly liable with the defendant, The Sharples Separator Company, for the injury therein complained of.

WHEREFORE plaintiff prays that this Court proceed no further herein except to make an order remanding said cause to the Superior Court of the State of California in and for the county of Imperial and that petitioner will every pray.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

State of California,
County of Imperial,—ss.

W. W. Skinner, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing and above-entitled [36] action that he has read the foregoing answer to the petition for removal and knows the contents thereof, that the same is true of his own knowledge, except as to the matter and things therein stated on his information and belief and that as to those matters and things he believes it to be *true*.

W. W. SKINNER.

Subscribed and sworn to before me this 7th day of October, 1915.

[Seal]

PHIL D. SWING,

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: 413—Civ. In the District Court of the United States for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation, and Edgar Bros. Company, a Corporation, Defendants. Answer to Petition for Removal. Recd. copy of within Answer this 11th day of Oct., 1915. Willard P. Smith, B. B. Blake, Attorney for Defendant, The Sharples Separator Company. Filed Oct. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Eshleman & Swing, Attorneys for Plaintiff. [37]

*In the District Court of the United States, Southern
District of California.*

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Notice of Motion of Application for Leave to Amend
the Petition for Removal Herein.**

To W. W. Skinner, Plaintiff:

To Eshleman & Swing, His Attorneys:

You and each of you please take notice that the

defendant Sharples Separator Company above named, will, on Monday, the 25th day of October, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled Court for leave to amend the petition for removal from the Superior Court of Imperial County, to the United States District Court.

Said motion will be made and based upon the following grounds:

1. That the defendant herein was unable to secure the facts necessary to set forth in the petition for removal until on or about the 18th day of October, 1915.

2. That the amendment of said petition is necessary in order to set out more fully and distinctly the facts which support the grounds upon which the same is based, and that the record and petition show sufficient grounds for removal and the ultimate jurisdictional facts are correctly [38] although imperfectly stated in the original petition.

On the hearing of said motion this defendant will rely upon, and read in evidence, the proposed amended petition, a copy of which is herewith served upon you, and the affidavit of Willard P. Smith, verified October 18th, 1915, a copy of which is also herewith served upon you and the record herein.

Dated this 18th day of October, 1915.

WILLARD P. SMITH,

BERKELEY B. BLAKE,

Attorneys for Defendant Sharples Separator Company. [39]

*In the District Court of the United States, Southern
District of California.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

Affidavit of Willard P. Smith.

State of California,

County of Los Angeles,—ss.

Willard P. Smith, being duly sworn, deposes and says: I am one of the attorneys for the defendant The Sharples Separator Company, and have my office in the city and county of San Francisco, California. That a petition for removal from the Superior Court in the State of California to the United States District Court in this District, was filed in said court on or about the 13th day of September, 1915, and the said Superior Court made an order removing the said cause from said court to this court on the 20th day of September, 1915, and the record in said court was filed in this court September 25th, 1915.

That on the 11th day of October, 1915, a notice of motion to remand this cause to the Superior Court of the State of California, Imperial County, together with the papers accompanying the same, was served

upon affiant at the city and county of San Francisco. That affiant immediately wired and wrote the defendant Edgar Brothers Company for information needed to meet said allegations contained in the affidavits used upon this motion, and that affiant immediately took up the matter with the Sharples Separator Company officials in the city and county of San Francisco, [40] and learned that Mr. C. Ehret, secretary of the Sharples Separator Company, who resides at West Chester in the State of Pennsylvania, had been in San Francisco during the month of October prior to the 11th day of October, and that the said secretary had taken all of the papers from the office of the Sharples Separator Company and gone down to the Imperial Valley to look into the facts in connection with this suit, and affiant was unable to secure any information from the other defendant, Edgar Brothers Company, until the 18th day of October, 1915, when they forwarded to affiant at Los Angeles an affidavit made by J. H. Edgar, and was unable to get in touch with the said secretary, Mr. C. Ehret until the said date, the 18th day of October, 1915. That immediately upon getting the facts from Mr. Ehret and from the defendant Edgar Brothers Company, affiant drew the amended petition with the intention of serving the same upon the plaintiff's attorneys on the 18th day of October, 1915, so that this matter could be taken up at the next motion day, to wit, October 25th, 1915.

WILLARD P. SMITH,

Subscribed and sworn to before me this 18th day of October, 1915.

[Seal]

I. R. RUBIN,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 413. In the United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, et al., Defendants. Notice of Motion of Application for Leave to Amend the Petition for Removal Herein. Affidavit. Received copy of the within notice this 18th day of October, 1915. Eshleman & Swing, Attys. for Plaintiff. Filed Oct. 18, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, 829 Citizens Nat'l Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, Attorneys for Sharples Separator Co. [41]

*In the District Court of the United States Southern
District of California.*

District Court No. —

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
a Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants.

*In the Superior Court of the State of California in
and for the County of Imperial.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Amended Petition for Removal to United States
District Court.**

To the Honorable the Superior Court of the State
of California in and for the County of Im-
perial:

Now comes The Sharples Separator Company, a
corporation, one of the defendants in the above-
entitled cause, and files this its petition for the re-
moval of said cause from the aforesaid Superior
Court, in which it is now pending, to the District
Court of the United States, in and for the South-
ern District of California, held at the City of Los
Angeles, in said District and State.

Petitioner would show unto your Honorable
Court:

1. That this cause was filed in your Honorable [42] Court on the 6th day of July, 1915, and defendant, The Sharples Separator Company was served with summons and complaint August 31st, 1915, and that the time to plead, answer or demur to the same has not expired under the laws of this State, in such cases made and provided. And your

petitioner is informed, and verily believes, that no process and no summons or complaint has been served upon the other defendant herein.

2. That the suit is one of a civil nature at common law, of which the District Courts of the United States have original jurisdiction, to wit, said suit is brought to recover a sum in excess of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

3. That the controversy herein between plaintiff and petitioner, is separable and is wholly between citizens of different states, and can be fully determined as between said parties. That the plaintiff was at the time of the commencement of this suit, and still is, a citizen of the State of California, residing in the county of Imperial, in said State; and that your petitioner, The Sharples Separator Company was, at the time of the commencement of this suit, and now is, a corporation organized under the laws of the State of Pennsylvania, with its principal place of business at West Chester, in said State; and a citizen of said State; and that your petitioner desires to remove this suit into the District Court of the United States to be held in the Southern District of California, Southern Division, and said controversy is between the plaintiff, a citizen of the State of California, and the defendant, The Sharples Separator Company, a citizen of the State of Pennsylvania, and the amount involved in said controversy was, and is now in excess of the sum of \$3,000, exclusive of interest and costs. [43]

4. Your petitioner further shows that the cause of action that plaintiff has alleged in his complaint

herein against the two defendants, your petitioner and Edgar Bros. Company, a corporation, is for damages arising from the sale and delivery to plaintiff of a certain mechanical milker, known as the "Sharples Mechanical Milker"; and that plaintiff alleges that the defendants on or about the 2d day of January, 1914, sold and delivered to plaintiff said mechanical milker, consisting of four milker units, and that defendants warranted the same to be in all respects fit and proper for the use of milking plaintiff's cows, and especially warranted that when said Sharples Mechanical Milker has been installed on plaintiff's ranch by defendants, it could safely be used for milking plaintiff's cows, and that the use thereof in milking said cows would not in any way injure said cows or decrease the amount of milk said cows would give, if said mechanical milker was operated and cared for in accordance with defendant's instructions; and plaintiff alleges that he, and also defendants, were unable to operate said mechanical milker so as not to injure plaintiff's cows, but on the contrary, while the same was being operated by plaintiff, and later by defendants, plaintiff's cows were injured, and asks for judgment against defendants in the sum of Four Thousand Five Hundred Twelve Dollars (\$4,512), exclusive of Amended interest and costs.

Nov. 1,
1915. Per

Min. Ord.

Nov. 1,
1915. Leslie

S. Colyer,
Deputy
Clerk.

defendants

5. That said allegation that plaintiff sold and delivered on January 2d, 1914, four mechanical units is false and untrue, and the falsity of said allegation was known to plaintiff

at the time said complaint was drawn and verified, and that in truth and in fact, the Sharples Separator Company, this petitioner, or on about January 2d, 1914, sold and delivered to plaintiff a Sharples Mechanical Milker consisting of three units, and plaintiff used said [44] Mechanical Milker consisting of three units from the installation thereof on or about February 7th, 1914, to a time subsequent to May 6th, 1914, and prior to May 30th, 1914. That on or about May 6th, 1914, plaintiff purchased an additional unit of said Milker from the defendant Edgar Brothers Company, and operated said four units for about two weeks, until about May 30th, 1914, and alleges that he has not operated said four units since said 20th day of May, 1914. That said sale of January 2d, 1914, was made by said Sharples Separator Company, your petitioner, upon a written order, upon which was printed certain warranties in writing, which said order your petitioner desires to produce upon the hearing hereof, and your petitioner is informed, and verily believes, that the sale made to plaintiff by the defendant Edgar Brothers Company was made upon an oral contract between said defendant and plaintiff, and had no connection with the written order above alleged, and the said units were purchased by plaintiff at said different times, and under two separate and distinct contracts, one with the defendant Sharples Separator Company, and the other four months later under a contract with the other defendant, Edgar Brothers Company. That defendant Edgar Brothers Company became the

sales agent for defendant Sharples Separator Company on May 14th, 1914, and said defendant Edgar Brothers Company never at any time operated any of said milker units, and acted herein solely as agents for this defendant, in matters pertaining to said agency.

6. That the defendant Edgar Brothers Company is, and was fraudulently and improperly joined as a party defendant, for the sole purpose of defeating the right of this petitioner for removing this cause to the United States District Court, and plaintiff falsely and untruthfully alleged that all of [45] said units were sold by defendants, well knowing that said allegation was false in that he knew that petitioner is, and was in no way jointly obligated, and made no joint warranty, or no joint contract, with said Edgar Brothers Company or plaintiff; and that said defendant Edgar Brothers Company is not in any way interested in the said controversy, and that all matters in the controversy between the plaintiff and defendant Sharples Separator Company can be fully determined without the addition of defendant Edgar Brothers Company.

7. That plaintiff claims to have a writing signed by an employee of this defendant to the effect that if this defendant would allow a further trial of said milker it would pay any damages caused thereby to plaintiff's cows, and plaintiff does not claim that defendant Edgar Brothers Company was a party to such alleged arrangement, but said alleged arrangement is referred to in paragraph eleven of

plaintiff's complaint as having been made by defendants.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court as provided by law, and as in duty bound your petitioner will ever pray.

THE SHARPLES SEPARATOR COMPANY.

By WILLARD P. SMITH,
BERKELEY B. BLAKE,
Its Attorneys. [46]

State of California,

County of Los Angeles,—ss.

C. Ehret affirms and says: That he is the secretary of The Sharples Separator Company, the petitioner herein named, and has knowledge of the facts set forth in said petition; that he has read the above and foregoing petition and knows the contents thereof, and that the same is true of his knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

CLEMENT EHRET.

Subscribed and affirmed before me this 18th day
of October, 1915.

[Seal]

I. R. RUBIN,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Original. No. 413. In the United States District Court, Southern District of Califor-

nia, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharpless Separator Company et al., Defendants. Amended Petition for Removal to United States District Court. Filed Oct. 18, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Received copy of the within Amended Petition this 18th day of October, 1915. Eshleman & Swing, Attorneys for Plaintiff. Willard P. Smith, Berkeley B. Blake, Claus Spreckels Bldg., San Francisco, Attorneys for Petitioner. Telephones: A 2752; Main 5166. [47]

At a stated term, to wit, the July Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
et al.,

Defendants.

Minutes of Court—October 25, 1915—Order Allowing Application for Leave to Amend Petition for Removal, etc.

This cause coming on at this time to be further heard on defendants' application for leave to file an amended petition for the removal of said cause to this court, and also to be heard on demurrer to defendants' petition for said removal, and also to be heard on plaintiff's motion to remand said cause to the Superior Court of the State of California, in and for the county of Imperial; Phil D. Swing, Esq., appearing as counsel for plaintiff; Willard P. Smith, Esq., appearing as counsel for defendants; and said application for leave to amend petition having been further argued, in support thereof, by Willard P. Smith, Esq., of counsel for defendants, and in opposition thereto by Phil D. Swing, Esq., of counsel for plaintiff; it is ordered that said application for leave to amend said petition be, and the same hereby is, allowed and plaintiff having demurred to said amended petition for removal, it is ordered that said demurrer to amended petition for removal be, and the same hereby is, overruled; and the affidavit of W. W. Skinner having been filed on behalf of plaintiff; and plaintiff's motion to remand this cause to the Superior Court of the State of California, in and for the County of Imperial, having been argued, in support thereof, by Phil D. Swing, Esq., of counsel for plaintiff; it is, at the hour of 2:10 [48] o'clock P. M., ordered that this cause be, and the same hereby

is, continued until the hour of 4 o'clock P. M. of this day for further hearing.

[Endorsed]: No. 413—Civil. United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company et al., Defendants. Copy of Order. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.
[49]

At a stated term, to wit, the July Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the first day of November, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY
et al.,

Defendants.

**Minutes of Court—November 1, 1915—Order
Amending Petition for Removal, etc.**

This cause coming on this day to be further heard on plaintiff's motion to remand said cause to the Superior Court of the State of California, in and

for the County of Imperial; Phil D. Swing, Esq., appearing as counsel for plaintiff; Willard P. Smith, Esq., appearing as counsel for defendants; now, on motion of Willard P. Smith, Esq., of counsel for defendants, which motion is not opposed by counsel for plaintiff, it is ordered that the petition for removal herein be amended by striking out the word "plaintiff" in line 26 on page 3 thereof, and inserting in lieu thereof the word "defendants," said amendment to be made by the clerk and attested by him with a reference to this order; and said motion to remand having been argued, in opposition thereto, by Willard P. Smith, Esq., of Counsel for defendants; it is ordered that this cause be, and the same hereby is, continued for further hearing until the hour of 2 o'clock P. M., of this day. * * *

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY
et al.,

Defendants. [50]

This cause coming on at this time to be further heard on plaintiff's motion to remand said cause to the Superior Court of the State of California, in and for the County of Imperial; Phil D. Swing, Esq., appearing as counsel for plaintiff, Willard P. Smith, Esq., appearing as counsel for defendants; and said motion to remand having been further argued, in opposition thereto, by Willard P. Smith, Esq., of

counsel for defendants, and in support thereof in reply by Phil D. Swing, Esq., of counsel for plaintiff; and this cause having been submitted to the Court for its consideration and decision on said motion to remand; it is by the Court ordered that plaintiff's motion to remand this cause to the Superior Court of the State of California in and for the County of Imperial be, and the same hereby is, denied.

[Endorsed]: No. 413—Civil. United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. Sharples Separator Company et al., Defendants. Copy of Order. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [51]

In the United States District Court for the Southern District of California, Southern Division.

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
a Corporation, and EDGAR BROS. COMPANY,
a Corporation,

Defendants.

Answer of Edgar Bros. Company, a Corporation.

Now comes defendant Edgar Bros. Company, a corporation, by its attorneys McPherrin & Nichols, and for its separate answer to the complaint on file

herein admits, denies and alleges:

I.

Admits that said Edgar Bros. Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business in Imperial, county of Imperial, State of California, and that at all times mentioned in the complaint was engaged in the sale of farm tools, implements, machinery and goods of a similar character.

Admits that it handles the goods of the Sharples Separator Company, but denies that at the time of any sale to plaintiff herein of a mechanical milker it handled, or was engaged in selling, the mechanical milker manufactured by the Sharples Separator Company.

II.

Admits that plaintiff was, and is, a farmer and dairyman within the county of Imperial, State of California, and that he was in possession of and milked a herd of dairy cows at the times mentioned in the said complaint. [52]

III.

Denies that this defendant on or about the 2d day of January, 1914, or at all, in said county of Imperial, or elsewhere, sold and delivered to the plaintiff a certain mechanical milker known as the Sharples Mechanical Milker; denies that it sold said plaintiff four milker units, known as the Sharples mechanical milker; denies that it warranted said milker units, or any milker units to be fit and proper for the use of milking plaintiff's cows, or any cows;

denies that it warranted four milker units or units to plaintiff at any time; denies that it stated, or warranted, to plaintiff that said Sharples mechanical milker could be safely used for milking plaintiff's cows when said milker was installed on plaintiff's ranch; denies that it installed said milker on plaintiff's ranch; denies that it warranted said milker, or any milker, would not injure plaintiff's cows; denies that it warranted that the amount of milk said cows would give would not decrease; denies that it warranted, in any manner, to plaintiff, said milker, or any part thereof, to any extent whatever.

IV.

This defendant further denies that it made any representations and warranties, or representations or warranties, to plaintiff before plaintiff made said purchase of a mechanical milker, upon which plaintiff could rely, or did rely; denies that it is responsible at all on any representations or warranties; denies that plaintiff believed any representations or warranties, or both, made by this defendant to plaintiff; denies that plaintiff received any information or knowledge from this defendant, either as representations or warranties, or both, except that this defendant may have delivered to plaintiff literature of said Sharples Separator Company, at the request of plaintiff. [53].

V.

Denies that on or about the 5th day of February, 1914, or at all, this defendant alone, or in conjunction with its codefendant, installed the Sharples mechanical milker, or any other milker, for plaintiff on his ranch near El Centro, Imperial county, or at

any other place; denies that it at that time, or at any other time, declared to plaintiff that said mechanical milker, or any milker, was then and there, or at any time, completely and properly installed; denies that it ever, at any time, made any statements relative to the condition of said milker after the same was set up or installed; denies that it declared to plaintiff that he could safely use and operate said mechanical milker after the same was installed for the purpose of milking his said cows; denies that it declared to plaintiff that if said milker was operated and cared for in accordance with defendant's instructions it would not injure plaintiff's said cows, nor decrease the amount of milk said cows would give; denies that it made any statement whatever to said plaintiff relative to the installation of a mechanical milker, or its safe use and operation, or the effect it would have on plaintiff's cows, or relative to the possible injury it might do plaintiff's cows, or relative to the decrease or lack of decrease in the amount of milk said cows would give.

VI.

This defendant further states that it has no information or belief upon the subject sufficient to enable it to answer the allegations of paragraph VII, of plaintiff's complaint, wherein plaintiff alleges that he, in good faith, began to use said mechanical milker for milking his said cows, and at all times operated and cared for said milker in strict conformity to and compliance with defendant's instruction; states that it has no [54] information or belief upon the subject sufficient to enable it to answer the allegation of

plaintiff that said mechanical milker was not then and there, nor has it since been, nor is it now, fit or proper to be used for milking the plaintiff's said cow; states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff that the use of said milker for milking plaintiff's cows bruised and injured the teats, udders and bag of many of plaintiff's said cows, and greatly lessened the amount of milk given by all of said cows; that it has no information or belief upon the subject sufficient to enable it to answer the allegations made by plaintiff that as soon as he discovered that the said milker was injuring his said cows he discontinued the use thereof; and placing its denial on said lack of information or belief above set out, denies all of said allegations, and especially the allegations set out in Paragraph VII, of plaintiff's complaint.

VII.

This defendant denies that on or about the 30th day of May, 1914, or any other time, plaintiff notified it that he had in good faith endeavored to use the said mechanical milker, for the purpose of milking his said cows, or for any other purpose; denies that plaintiff notified it that said milker was wholly insufficient for said purpose; denies that plaintiff notified it that said milker did not in any respect comply with warranties made by it, or its codefendant; denies that plaintiff offered to return said milker to this defendant.

VIII.

Denies that this defendant repeated any former representations and warranties; denies that it ever,

at any time, made any representations and warranties, or representations or [55] warranties relative to said mechanical milker; denies that it asserted to plaintiff that said mechanical milker had not been given a fair trial; denies that it insisted that defendants, or either of them, be permitted to operate the said milker upon plaintiff's cows; denies that it again represented, or ever represented, that the said mechanical milker properly operated would not in any way injure plaintiff's cows; denies that on or about the 25th day of June, 1914, or at all, this defendant either alone or in conjunction with its codefendant, began to operate said mechanical milker in milking plaintiff's said cows at his said ranch in Imperial county, or any place else; denies that it continued, either alone or in conjunction with its codefendant, to so operate said milker for a period of about two weeks thereafter; denies that it ever, at any time, either directly or indirectly, offered to operate, attempted to operate or did operate said mechanical milker for said plaintiff; denies that said mechanical milker was under this defendant's sole care, custody and control for said period of two weeks, or for any other time; denies that said mechanical milker was under this defendant's care or custody or control at any time for any period whatever; denies that said mechanical milker, while being operated by this defendant, or this defendant in conjunction with its codefendant, in milking plaintiff's cows did greatly injure said cows, and totally and permanently ruin many, or any, of said cows; denies that it had any connection whatever with any act, or performed any act, that injured or affected said cows; denies that it

ever attempted to operate said milker; denies that it, on or about the 7th day of July, 1914, or at any other time, abandoned its attempt to make said milker work. [56].

IX.

Defendant states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of the complaint that plaintiff did not again attempt to use said mechanical milker, and placing its denial on said ground, denies the same; denies that plaintiff notified this defendant again, or at all, that said milker was useless and worthless, and offered to return the same to it; denies that plaintiff ever offered to return said milker to this defendant; denies that plaintiff demanded from this defendant that it return to him the purchase price of said milker; denies that he demanded of this defendant any damages for the injury done to his said cows by the operation of said milker.

X.

Defendant further denies that on or about the 20th day of October, 1914, this defendant asserted, or ever asserted, that said mechanical milker was a fit and proper machine for milking plaintiff's cows; always stated that it knew nothing about mechanical milkers whatever; denies that it represented at the date above mentioned, or at all, that said milker could be successfully operated without injury to plaintiff's cows; denies that it insisted that it, or that both defendants, be permitted another trial, or any trial, upon plaintiff's said cows; denies that it again represented and warranted, or ever represented or warranted, that said mechanical milker would not in any

way injure plaintiff's cows; denies that it agreed to pay plaintiff all damage, or any damage, caused plaintiff's cows by said mechanical milker.

Denies that plaintiff consented to this defendant that it might have another trial, or any trial, or said milker; denies that on the 20th day of October, 1914, or at any other time, this defendant, alone or in conjunction with its codefendant, began the operation of said mechanical milker on plaintiff's said cows [57] and attempted to milk plaintiff's said cows therewith; denies that from the 20th day of October, 1914, to the 18th day of December, 1914, or at any other time, this defendant, either alone or in conjunction with its codefendant, operated said milker upon plaintiff's said cows; denies that during said time, or at any other time, this defendant, alone or with its codefendant, had the sole care, custody and control of said machine; denies that it had anything to do with said machine at said time, or at any other time; denies that said mechanical milker, while being operated by this defendant, or by this defendant in conjunction with its codefendant, greatly injured said cows, or any of them by bruising and diseasing the teats, udders and bags of said cows, or in any way injured said cows; denies that by reason thereof said cows were totally and permanently ruined for dairy purposes; denies that any of said cows were injured at all by the acts or omissions of this defendant; denies that on the 18th day of December, 1914, this defendant discontinued operating said milker; states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff's complaint, wherein plaintiff states that

since the 18th day of December, 1914, said milker has not been used, and placing its denial on said ground, denies the same.

XI.

Denies that on or about the 18th day of December, 1914, or at any other time, plaintiff, after a full and fair trial of said milker, or at all, notified this defendant of the insufficiency of said milker to do the things which defendants had represented and warranted it would do; denies that plaintiff notified this defendant as to any representations or warranties made by it, and the breach thereof; denies that plaintiff offered to return the said milker to this defendant at any time; denies that plaintiff [58] demanded that this defendant return to him the purchase price of said milker; denies that plaintiff demanded that this defendant pay him for the damage and loss to his said cows.

XII.

Defendant further states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff's complaint wherein plaintiff alleges that before said Sharples' mechanical milker was used on his cows said cows were a valuable herd of healthy, well-bred, dairy cows, free from disease; that it has no information upon the subject sufficient to enable it to answer the allegation of said complaint that as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid two of said plaintiff's cows died from the injurious effects upon them of said milker, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars; that five were totally and

permanently ruined for all purposes to plaintiff's damage in the sum of Six Hundred Seventy-five (\$675) Dollars; that ten were totally and permanently ruined for dairy purposes to plaintiff's damage in the sum of Seven Hundred Thirty (\$730) Dollars; that ten were injured, each by the loss of the use of one or more teats, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars, making plaintiff's total damage Two Thousand Five (\$2,005) Dollars, and placing its denial on said ground, denies the same.

Defendant further states that it has no information and belief sufficient to enable it to answer any of the allegations in paragraph XIII of said plaintiff's complaint, and placing its denial on that ground, denies all of said allegations therein contained.

XIII.

Defendant further states that it has no information or [59] belief sufficient to enable it to answer the allegation in plaintiff's complaint that as a direct result of his efforts made in good faith to use said mechanical milker he has suffered a loss of butter fat to the value of One Thousand Five Hundred (\$1,500) Dollars, and placing its denial on said ground, denies the same.

This defendant further states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff that the purchase and installation of said mechanical milker cost the sum of One Thousand Seven (\$1,007) Dollars, and placing its denial on said ground, denies the same.

This defendant denies that there is now due, owing

and unpaid, or due, or owing or unpaid, from this defendant to plaintiff, the sum of Four Thousand Five Hundred Twelve (\$4,512) Dollars, or any part thereof, or any sum whatever.

WHEREFORE, defendant asks that it may go hence with its costs herein expended.

Attorneys for Defendant.

State of California,
County of Imperial,—ss.

J. H. Edgar, being duly sworn, says: That he is the manager of plaintiff in the foregoing entitled matter; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information or belief and as to those matters that he believes it to be true. That he is one of the elected officers of said corporation, and that he makes this affidavit for and in behalf of said corporation.

[Seal]

J. H. EDGAR.

Subscribed and sworn to before me this 1st day of November, A. D. 1915.

[Notarial Seal] WM. O. HENDERKS,
Notary Public in and for the County of Imperial,
State of California. [60]

[Endorsed]: No. 413-Civ. U. S. Dis. Court, So. Dis. Calif., So. Div. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a corporation, and Edgar Bros. Company, a Corporation, Defendants. Answer of Edgar Bros. Company, a Corporation. It is hereby agreed by plaintiff that defendant

Edgar Bros. Company may have until November 5th, 1915, in which to file this answer. Eshleman & Swing, Attorneys for Plaintiff. It is so ordered. Trippet, Judge. Received copy of the within answer this 1st day of Nov. 1915. Eshleman & Swing, Attorney for Pltf. Filed Nov. 5, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. McPherrin & Nichols, First National Bank Building, Imperial, Cal., Attorneys for Defendant. [61]

*In the United States District Court, for the Southern
District of California, Southern Division.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROS. COMPANY, a Corporation,

Defendants.

Amended Complaint.

Comes now the plaintiff above named and by leave of Court first had and obtained filed this his amended complaint and for cause of action against the above named defendants, alleges:

I.

That plaintiff is informed and believes and therefore alleges the fact to be that The Sharples Separator Company is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania and having its principal place of business at West Chester, Pennsylvania. That said The Shar-

ples Separator Company has not filed the certified copy of its Articles of Incorporation in the office of the Secretary of the State of California, nor designated a person residing within the State of California upon whom process issued by authority of or under the laws of the State of California may be served. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the transaction of business within the state of California. That at all times herein mentioned said The Sharples Separator Company has been and now is engaged in the manufacture and sale of cream separators and mechanical milkers. [62]

II.

That Edgar Bros. Company is a corporation incorporated and existing under and by virtue of the laws of the State of California, and having its principal place of business at the city of Imperial, county of Imperial, State of California, and at all times herein mentioned has been and now is engaged in the sale of farm and dairy tools, implements, and machinery, including the manufactured products of the said The Sharples Separator Company.

III.

That plaintiff was at all times herein mentioned was a farmer and dairyman within the county of Imperial, State of California, and at all times herein mentioned has owned, cared for, and milked and now does own, care for, and milk a herd of dairy cows as defendants at all times herein mentioned well knew.

IV.

That on or about the 2d day of January, 1914, at

El Centro, in the county of Imperial, State of California, and while plaintiff was the owner, as aforesaid, of a herd of dairy cows, consisting of about ninety (90) head, the defendants sold to the plaintiff a certain mechanical milker known as the SHARPLES MECHANICAL MILKER, consisting of three milker units and then and there warranted the same to be in all respects fit and proper for the said use, of milking plaintiff's said cows and especially warranted that when said SHARPLES MECHANICAL MILKER had been installed on plaintiff's ranch by defendants, it could be safely used for milking plaintiff's said cows and that the use thereof in milking said cows would not in any way injure said cows nor decrease the amount of milk said cows would give if said mechanical milker was operated and cared for in accordance with defendant's instructions.

V.

That plaintiff had no information or knowledge regarding said mechanical milker or any mechanical milker, other than the representations [63] and warranties of defendants and had no means to and was unable to ascertain the truth or falsity of defendants' said representations and warranties before making said purchase and plaintiff believed the said representations of defendants and relied upon their said warranties and made said purchase solely by reason of said representations and warranties.

VI.

That on or about the 5th day of February, 1914, defendants installed said The Sharples Mechanical Milker for plaintiff on his ranch near El Centro,

said County of Imperial, and declared to plaintiff that the said mechanical milker was then and there completely and properly installed and that he could thereafter safely use and operate it for milking plaintiff's said cows and that if operated and cared for in accordance with defendant's instructions, the same would not in any way injure plaintiff's said cows nor decrease the amount of milk said cows would give.

VII.

That thereafter and before plaintiff had discovered that said mechanical milker was injuring his said cows, plaintiff purchased through defendant, Edgar Bros. Company, an additional unit of said Sharples Mechanical milker which unit, it was agreed by defendants, should be affixed to the Sharples Mechanical milker, already purchased by plaintiff and should be operated jointly with the other three units. That prior to the purchase of said unit, the same warranties and representations had been made to plaintiff regarding it as had been made to him regarding the said Sharples Mechanical Milker. That thereafter, to wit, about May 6, 1914, said fourth unit was delivered to plaintiff and was, in accordance with said previous understanding and agreement, affixed to the said Sharples Mechanical Milker and thereafter operated together with the other three units as one milker.

VIII.

That after the installation of said Sharples Mechanical [64] Milker, plaintiff began in good faith to use the said mechanical milker for milking

his said cows and at all times operated and cared for said mechanical milker in strict conformity to and in compliance with all of defendants' instructions but said mechanical milker was not then and there, nor has it since been, nor is it now, fit or proper to be used for milking plaintiff's said cows but the use thereof for milking plaintiff's said cows bruised and injured the teats, udders and bags of many of plaintiff's said cows and greatly lessened the amount of milk given by all of said cows. That as soon as plaintiff discovered that the said milker was injuring his said cows, he discontinued the use thereof on the cows showing injury from the use thereof.

IX.

That on or about the 30th day of May, 1914, plaintiff notified defendants that he had in good faith endeavored to use the said mechanical milker for the purpose of milking his said cows but that said milker was wholly insufficient for said purpose and that it did not in any respect comply with their warranties.

X.

That defendants thereupon repeated all their former representations and warranties and asserted that the said mechanical milker had not been given a fair trial and insisted that defendants be permitted to operate the same upon plaintiff's cows and again represented said mechanical milker properly operated would not in any way injure plaintiff's said cows and on or about the 25th day of June, 1914, defendants, themselves, began to operate said mechanical milker in milking plaintiff's said cows on

his ranch in Imperial County and continued to so operate it for a period of about two weeks thereafter, during which time said mechanical milker was under the defendant's sole care, custody and control. That defendants were wholly unable to operate said mechanical milker so as not to injure plaintiff's said cows but on the contrary, the said mechanical milker, while being operated by defendants, as aforesaid, [65] in milking plaintiff's said cows, did greatly injure said cows and totally and permanently ruining many of them for any and all purposes whatever. That after their unsuccessful attempt to operate said milker, to wit, on or about the 7th of July, 1914, defendants, themselves, abandoned their said attempt to make said milker work.

XI.

That after defendants discontinued operating said mechanical milker, as aforesaid, plaintiff did not again attempt to use the same but again notified defendants that the same was useless and worthless and offered to return the same to the defendants and demanded that defendants return to him the purchase price thereof and damages for the injury done his said cows by the operation of said milker, as aforesaid.

XII.

That on or about the 20th day of October, 1914, defendants again asserted that that said mechanical milker was a fit and proper machine for milking plaintiff's cows and represented that said milker could be successfully operated without injury to plaintiff's cows and insisted that they be permitted

another trial thereof upon plaintiff's said cows, and again represented and warranted that the mechanical milker would not in any way injure plaintiff's said cows and agreed to pay plaintiff all damages caused his said cows by said mechanical milker. That plaintiff consented to another trial and on the 20th day of October, 1914, defendants again began the operation of said mechanical milker on plaintiff's cows and attempted to milk plaintiff's said cows therewith. That from the said 20th day of October, 1914, to the 18th day of December, 1914, defendants continued to operate said milker upon plaintiff's said cows and during all that period defendants had the sole care, custody and control of said machine. That said mechanical milker while being operated, as aforesaid, by said defendants, greatly [66] injured plaintiff's said cows by bruising and inflaming the teats, udders and bags of said cows and totally and permanently ruining many of said cows for dairy purposes and for all purposes whatever. That on the 18th day of December, 1914, defendants discontinued operating the said milker and the same has not been used since.

XIII.

That at all times herein mentioned said mechanical milker has been and now is wholly and entirely useless and worthless and of no value whatever. That on or about the 18th day of December, 1914, plaintiff notified defendants of the insufficiency of the said milker to do the things which defendants had represented and warranted it would and could do, and offered to return the said milker to the de-

fendants and demanded that defendants return him the purchase price of said milker and also that defendants pay him for the damages and loss to his said cows.

XIV.

That before said Sharples Mechanical Milker was used on plaintiff's said cows, as aforesaid, they were a valuable herd of healthy, well bred dairy cows free from disease. That as a direct result of the use of said mechanical milker by defendants for milking plaintiff's said cows, as aforesaid, two of his cows died from the injurious effects upon them by said mechanical milker, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars; five (5) were totally and permanently ruined for all purposes, to plaintiff's damage in the sum of Six Hundred Seventy-five (\$675) Dollars; ten (10) were totally and permanently ruined for dairy purposes, to plaintiff's damage in the sum of Seven Hundred Thirty (\$730) Dollars; ten (10) were injured, each by the loss of the use of one or more teats, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars, making plaintiff's total damage by reason of the injury from the use of said Sharples Mechanical Milker by defendants, as aforesaid, to his said cows the sum of Two Thousand Five (\$2,005) Dollars. [67]

XV.

That as a direct result of the use of the said mechanical milker, as aforesaid, plaintiff has suffered a loss of butter fat received from said cows, amounting to Six Thousand (6,000) pounds to his damage

in the sum of Fifteen Hundred (\$1500) Dollars.

XVI.

That plaintiff paid defendants in the purchase and installation of said mechanical milker the sum of One Thousand Seven (\$1,007) Dollars.

XVII.

That defendants have paid plaintiff no part of said sum of Forty-five Hundred Twelve (\$4512) Dollars but the whole sum thereof is now due, owing and unpaid.

WHEREFORE plaintiff prays judgment against defendants for the sum of Forty-five Hundred Twelve (\$4512) Dollars and for costs of suit incurred herein.

ESHLEMAN & SWING,
Attorneys for Plaintiff.

State of California,
County of Imperial,—ss.

W. W. Skinner, being duly sworn, deposes and says: That he is the plaintiff in the foregoing and above-entitled action, that he has heard read the foregoing amended complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on his information and belief, and that as to those matters and things he believes it to be true.

W. W. SKINNER.

Subscribed and sworn to before me this 15 day
of January, 1916.

[Seal]

PHIL D. SWING,

Notary Public in and for the County of Imperial,
State of California. [68]

[Endorsed]: No. 413-Civ. U. S. District Court,
S. D. State of California. W. W. Skinner, Plaintiff,
vs. The Sharples Separator Co., and Edgar Bros.
Company, a Corporation, Defendant.
Amended Complaint. Received copy of the within
Amended Complaint this 22 day of January, 1916.
Willard P. Smith, B. B. Blake, Attorneys for
Sharples Separator Co. Filed Feb. 2, 1916. Wm.
M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy.
Eshleman & Swing, Suite 6, 7, and 8, Security Sav-
ings Bank Building, El Centro, California, Phone
150, Attorneys for Plaintiff. [69]

*In the District Court of the United States, for the
Southern District of California, Southern Divi-
sion.*

No. 413—Civ.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COMPANY,
a Corporation,

Defendants.

Answer of Defendant The Sharples Separator Company to Amended Complaint.

Now comes the Sharples Separator Company, a corporation, one of the defendants above named, and answering plaintiff's amended complaint on file herein, admits, alleges and denies as follows:

I.

Answering the allegations contained in paragraphs II, III, V, XIV and XV of said amended complaint, this defendant states that it has no information or belief upon the subject sufficient to enable it to answer the said allegations and, basing its denial upon that ground, denies each and every, all and singular, the allegations in said paragraphs contained.

II.

Answering the allegations contained in paragraph IV of said complaint, this defendant admits that on or about the 2nd day of January, 1914, it sold plaintiff under a contract in writing a certain Sharples mechanical milker consisting of three milker units, but denies that at said time, or at any [70] other time, at El Centro, in the County of Imperial, State of California, or at any other place, or at all, the defendants or this defendant then and there or then or there warranted the same to be in all or in any respects fit or proper for the use of milking plaintiff's cows, and denies that defendants or this defendant especially warranted that when said milker had been installed on plaintiff's ranch by defendants or by this defendant it could safely be used

for milking plaintiff's said cows, or that the use thereof in milking said cows would not in any way injure said cows or decrease the amount of milk said cows would give if said mechanical milker was operated or cared for in accordance with defendant's instructions.

III.

Answering the allegations contained in paragraph VI of said complaint, this defendant denies that on or about the 5th day of February, 1914, or at any other time, or at all, the defendants, or this defendant, declared to plaintiff that the said milkers were then and there, or then or there, completely and properly, or completely or properly, installed, or that he could thereafter use or operate them for milking his cows or that if operated or cared for in accordance with defendants' or this defendant's instructions the same would not in any way injure his cows, or decrease the amount of milk said cows would give.

IV.

Answering the allegations contained in paragraph VII of said complaint, this defendant denies that it was agreed by defendants that an additional unit of said Sharples milker should be operated jointly with said other three units, and denies that the same or any warranties or representations [71] were or had been made to plaintiff regarding said unit, as had been made to plaintiff regarding the said Sharples mechanical milker; and alleges that defendant has no knowledge or information upon the subject sufficient to enable it to answer as to when

the fourth unit was delivered to plaintiff, or whether or not the same was operated together with three units as one milker, and, basing its denial on that ground, denies each and every and all the said allegations; and denies that the said unit was affixed to said milker in accordance with any previous understanding and agreement, or understanding or agreement.

V.

Answering the allegations contained in paragraph VIII of said complaint, this defendant denies that plaintiff began to use or used the said mechanical milker for milking his cows, or operated or cared for said mechanical milker in strict or any conformity or in compliance with all or any of defendants', or of this defendant's, instructions and alleges that plaintiff failed to conform or comply in any way with the instructions of this defendant in the operation of said milker; and denies that said mechanical milker at any of the times mentioned in said paragraph VIII was not fit or proper to be used for milking plaintiff's cows, and alleges that it was at all times fit and proper for use in milking plaintiff's cows; and, except as above stated, this defendant states that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph VIII, and, basing its denial upon that ground, denies each and every, all and singular, the allegations in said paragraph contained.

VI.

Answering the allegations contained in paragraph

X of [72] said complaint, this defendant denies that the defendants thereupon or at any time or at all repeated all or any representations or warranties alleged to have been made theretofore, and denies that they made any assertions in regard to any representations and warranties, and denies that they insisted that defendants or this defendant be permitted to operate the same, and denies that they represented in any way the said mechanical milker when properly operated would not in any way injure plaintiff's cows; denies that on or about the 25th day of June, 1914, or at any time, the defendants themselves, or this defendant, began to operate said milker for milking plaintiff's cows or continued to operate it for a period of about two weeks, or for any period thereafter, and denies that during any period of time said milker was under the defendants' or this defendant's sole care, custody and control, or sole care, custody or control, and denies that defendants were unable to operate said mechanical milker, so as not to injure plaintiff's cows; and denies that said milker while being operated by defendants or by this defendant in milking plaintiff's cows injured said cows or any of them, and denies that it totally or permanently or at all ruined any of them, for all or any purposes, and denies that defendants or this defendant made an unsuccessful or any attempt to operate said milker, or that on or about the 7th day of July, 1914, or at any other time, defendants or this defendant abandoned their attempt to make said milker work.

VII.

Answering the allegations contained in paragraph XI of said complaint, this defendant alleges that as to the allegations that after the time when defendants are alleged by plaintiff to have discontinued operating said mechanical milker, as [73] alleged in said complaint, plaintiff did not again attempt to use the same, this defendant has no information or belief upon the subject sufficient to enable it to answer, and, basing its answer upon said grounds, denies the said allegations.

VIII.

Answering the allegations contained in paragraph XII of said complaint, this defendant denies that on or about the 20th day of October, 1914, or at any other time, defendants or this defendant again or at all warranted that said mechanical milker was a fit and proper or fit or proper machine for milking plaintiff's cows, or represented the said milker could be successfully operated without injury to plaintiff's cows, or insisted that they or it be permitted another trial thereof upon plaintiff's said cows or again represented or warranted that the said mechanical milker would not in any way injure plaintiff's cows or agreed to pay plaintiff all or any damages caused his said cows by said mechanical milker; denies that plaintiff consented to another trial and on the 20th day of October, 1914, or on the 20th day of October, 1914, or at any other time, that defendants or this defendant again or at all began the operation of said mechanical milker on plaintiff's cows or attempted to milk plaintiff's said cows therewith; denies that

from the said 20th day of October, 1914, to the 18th day of December, 1914, or at any other time, defendants or this defendant continued to operate said milker upon plaintiff's said cows, or that during all that period or during any other period defendants or this defendant had the sole or any care, custody or control of said machine; alleges that as to whether during the period that said mechanical milker is alleged by plaintiff to have been operated by said defendants the said milker [74] greatly or at all injured plaintiff's said cows by bruising or diseasing the teats, udders or bags of said cows or totally or permanently or at all ruined many or any of said cows for dairy purposes or for any purposes whatever and as to whether on the 18th day of December, 1914, or at any other time, defendants or this defendant discontinued operating said milker, or whether the same has not been used since, this defendant has no information or belief upon the subject sufficient to enable it to answer the said allegations, and, basing its answer upon said ground, this defendant denies each and every, all and singular, of said allegations.

IX.

Answering the allegations contained in paragraph XIV of said complaint, this defendant alleges that as to whether before the use of said milker on plaintiff's said cows said cows were a valuable herd of healthy well bred dairy cows free from disease this defendant has no information or belief upon the subject sufficient to enable it to answer the said allegations, and, basing its answer upon that

ground, denies each and every, all and singular, the said allegations; denies that defendants made efforts in good faith to use the said mechanical milker as aforesaid, and denies that as a direct result of the efforts made to use the said mechanical milker two or any of plaintiff's cows died from the injurious effects of said milker or that five or any of said cows were totally or permanently ruined, and denies that ten or any of said cows were totally or permanently ruined for dairy or any other purposes, and denies that ten of said cows were injured as alleged in said paragraph, and denies that plaintiff has been damaged in the sum of two thousand five dollars as alleged in said paragraph [75] XIV, or in any other sum, or at all, and denies that any of plaintiff's cows were injured by reason of the use of said milker.

X.

Answering the allegations contained in paragraph XVI of said complaint, this defendant denies that plaintiff paid defendants or this defendant in the purchase and installation or in the purchase or installation of said mechanical milker the sum of one thousand seven dollars.

XI.

Answering the allegations contained in paragraph XVII of said complaint, this defendant denies that the sum of four thousand five hundred twelve dollars, or any other sum, is now due, owing or unpaid from defendants or from this defendant to plaintiff.

By way of a further and affirmative defense to plaintiff's amended complaint on file herein, and to

each and every of the allegations thereof, this defendant alleges:

I.

That prior to the commencement of this action defendant agreed to sell to plaintiff and plaintiff agreed to buy from defendant a Sharples milker equipment consisting of a pump and three units installed complete less transportation charges on outfit, power, belting, countershafting, etc., not included in said equipment; that it was further agreed by and between plaintiff and defendant that said sale was made with the understanding that the plaintiff would have the machine operated and cared for in accordance with defendant's instructions; that the machine would be kept in good order mechanically; that pressure [76] and vacuum would be maintained in accordance with defendant's instructions; that the cows would be carefully and thoroughly stripped after each milking and that the machine would be thoroughly cleaned after each milking and that all reasonable precautions tending to the production of clean milk would be observed.

II.

That thereafter defendant furnished plaintiff with instructions for the operation of said machines; that plaintiff failed to clean said machines after each milking and said plaintiff failed to observe reasonable precautions tending to the production of clean milk, and that plaintiff maintained and kept the said dairy, barn and premises in an unclean and unsanitary condition, and that if any injuries were inflicted upon the plaintiff's cows as

alleged in plaintiff's complaint, said injuries were the result of the unclean and unsanitary condition of said barn and of said premises, and of the failure of said plaintiff to take reasonable precautions for keeping said premises in a proper and sanitary condition.

III.

That it was further agreed by and between plaintiff and defendant that defendant would replace any parts of said Sharples milker equipment found to be defective in workmanship or material, provided written notice thereof was sent to this defendant by the purchaser and said defective part was returned within one year from the date of said purchase; but that said defendant would not replace any parts found to be defective as a result of ordinary wear and tear, accidents, or abuse; that plaintiff failed to send defendant written notice of any defects in said machine due to workmanship or materials and that if any [77] damages arose from the use of said machine said damages were caused by the abuse of said machine by plaintiff.

WHEREFORE, defendant The Sharples Separator Company having fully answered, prays that plaintiff take nothing by his said amended complaint, and that it have judgment herein for its costs.

WILLARD P. SMITH,
B. B. BLAKE,

Attorneys for Defendant The Sharples Separator
Company.

State of California,
City and County of San Francisco,—ss.

C. Ehret affirms, deposes and says:

That he is an officer, to wit, the secretary of The Sharples Separator Company, one of the defendants named in the above-entitled action; that he has read the foregoing answer of the said defendant to the amended complaint of plaintiff and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information or belief, and that as to those matters and things he believes it to be true.

CLEMENT EHRET.

Subscribed and affirmed to before me this 12th day of February, 1916.

[Seal] E. J. CASEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. Civ. 413. In the District Court of the United States, for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company et al., Defendants. Answer of Defendant the Sharples Separator Company to Amended Complaint. Filed Feb. 14, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Willard P. Smith, Berkeley B. Blake, Attorneys for Defendant, 1601-9 Claus Spreckels Bldg., San Francisco, Cal.

*In the United States District Court for the Southern
District of California, Southern Division.*

No. —.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation,

Defendants.

**Amended Answer of Edgar Bros. Company, a
Corporation.**

Now comes defendant Edgar Bros. Company, a corporation, by its attorneys McPherrin & Nichols, and for its separate amended answer to the amended complaint on file herein, admits, denies and alleges:

I.

Admits that said Edgar Bros. Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business in Imperial, county of Imperial, State of California, and that at all times mentioned in the complaint was engaged in the sale of farm tools, implements, machinery and goods of a similar character.

Admits that it handled the goods of the Sharples Separator Company, but denies that at the time of any sale to plaintiff herein of a mechanical milker it handled, or was engaged in selling, the mechanical

milker manufactured by the Sharples Separator Company.

II.

Admits that plaintiff was, and is, a farmer and dairyman within the county of Imperial, State of California, and that he was in possession of and *mailed* a herd of dairy cows at the times mentioned in the said complaint. [79]

III.

Denies that this defendant on or about the 2d day of January, or at all, in said county of Imperial, or elsewhere, sold and delivered to the plaintiff a certain mechanical milker known as the Sharples mechanical miler; denies that it sold said plaintiff three milker units, known as the Sharples mechanical milker; denies that it warranted said milker units, or any milker units to be fit and proper for the use of milking plaintiff's cows, or any cows; denies that it warranted three milker units, or any units, to plaintiff at any time; denies that it stated, or warranted, to plaintiff that said Sharples mechanical milker could be safely used for milking plaintiff's cows when said milker was installed on plaintiff's ranch; denies that it installed said milker on plaintiff's rance; denies that it warranted said milker, or any milker, would not injure plaintiff's cows; denies that it warranted that the amount of milk said cows would give would not decrease; denies that it waranted, in any manner, to plaintiff said milker, or any part thereof, to any extent whatever.

IV.

This defendant further denies that it made any

representations and warranties, or representations or warranties, to plaintiff before plaintiff made said purchase of a mechanical milker, upon which plaintiff could rely, or did rely; denies that it is responsible at all on any representations or warranties; denies that plaintiff believed any representations or warranties, or both, made by this defendant to plaintiff; denies that plaintiff received any information or knowledge from this defendant, either as representations or warranties, or both, except that this defendant may have delivered to plaintiff literature of said Sharples Separator Company, at the request of plaintiff. [80]

V.

Denies that on or about the 5th day of February, 1914, or at all, this defendant alone, or in conjunction with its codefendant, installed the Sharples mechanical milker, or any other milker, for plaintiff on his ranch near El Centro, Imperial county, or at any other place; denies that it at that time, or at any other time, declared to plaintiff that said mechanical milker, or any milker, was then and there, or at any time, completely and properly installed; denies that it ever, at any time, made any statements relative to the condition of said milker after the same was set up or installed; denies that it declared to plaintiff that he could safely use and operate said mechanical milker after the same was installed for the purpose of milking his said cows; denies that it declared to plaintiff that if said milker was operated and cared for in accordance with defendant's instructions it would not injure plaintiff's

said cows, nor decrease the amount of milk said cows would give; denies that it made any statement whatever to said plaintiff relative to the installation of a mechanical milker, or its safe use and operation, or the effect it would have on plaintiff's cows, or relative to the possible injury it might do plaintiff's cows, or relative to the decrease or lack of decrease in the amount of milk said cows would give.

VI.

Denies that the plaintiff, after the installation of said mechanical milker, and subsequent to the 5th day of February, 1914, purchased from this defendant an additional unit of said Sharples mechanical milker; denies that it sold said additional unit to said plaintiff; denies that it agreed that said additional unit should be affixed to any unit or units theretofore purchased by said plaintiff, and denies that it agreed that said additional unit should be operated jointly with [81] any unit or units theretofore purchased by said plaintiff; denies that it warranted said milker unit in any manner, or to any extent; denies that it made any representations to the plaintiff respecting said milker unit; denies that it delivered said additional milker unit to the plaintiff herein, in accordance with any previous understanding or agreement, or at all; denies that it affixed said additional milker unit to said Sharples mechanical milker, or installed the same in any manner.

VII.

This defendant further states that it has no information or belief upon the subject sufficient to

enable it to answer the allegations of Paragraph VIII, of plaintiff's amended complaint, wherein plaintiff alleges that he, in good faith, began to use said mechanical milker for milking his said cows, and at all times operated and cared for said milker in strict conformity to and in compliance with defendant's instructions; states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff that said mechanical milker was not then and there, nor has it since been, nor is it now, fit or proper to be used for milking the plaintiff's said cows; states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff that the use of said milker for milking plaintiff's cows bruised and injured the teats, udders and bag of many of plaintiff's said cows, and greatly lessened the amount of milk given by all of said cows; that it has no information or belief upon the subject sufficient to enable it to answer the allegation made by plaintiff that as soon as he discovered that the said milker was injuring his said cows he discontinued the use thereof; and placing its denial on said lack of information or belief above set out, denies all of said allegations, and especially the allegations set out in Paragraph VIII, of plaintiff's amended complaint. [82]

VIII.

This defendant denies that on or about the 30th day of May, 1914, or any other time, plaintiff notified it that he had in good faith endeavored to use the said mechanical milker for the purpose of milking

his said cows, or for any other purpose; denies that plaintiff notified it that said milker was wholly insufficient for said purpose; denies that plaintiff notified it that said milker did not in any respect comply with warranties made by it, or its codefendant; denies that plaintiff offered to return said milker to this defendant.

IX.

Denies that this defendant repeated any former representations and warranties; denies that it ever, at any time, made any representations and warranties; denies that it ever, at any time, made any representations and warranties, or representations or warranties relative to said mechanical milker; denies that it asserted to plaintiff that said mechanical milker had not been given a fair trial; denies that it insisted that defendants, or either of them, be permitted to operate the said milker upon plaintiff's cows; denies that it again represented, or ever represented, that the said mechanical milker properly operated would not in any way injure plaintiff's cows; denies that on or about the 25th day of June, 1914, or at all, this defendant, either alone or in conjunction with its codefendant, began to operate said mechanical milker in milking plaintiff's said cows at his said ranch in Imperial county, or any place else; denies that it continued, either alone or in conjunction with its codefendant, to so operate said milker for a period of about two weeks thereafter; denies that it ever, at any time, either directly or indirectly, offered to operate, attempted to operate or did operate said mechanical milker for said plain-

tiff; denies that said mechanical milker was under this defendant's sole care, custody and control for said period of two weeks, or for [83] any other time; denies that said mechanical milker was under this defendant's care or custody or control at any time for any period whatever; denies that said mechanical milker, while being operated by this defendant, or this defendant in conjunction with its codefendant, in milking plaintiff's cows did greatly injure said cows, and totally and permanently ruin many, or any of said cows; denies that it had any connection whatever with any act, or performed any act, that injured or affected said cow; denies that it ever attempted to operate said milker; denies that it, on or about the 7th day of July, 1914, or at any other time, abandoned its attempt to make said milker work.

X.

Defendant states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of the complaint that plaintiff did not again attempt to use said mechanical milker, and placing its denial on said ground, denies the same; denies that plaintiff notified this defendant again, or at all, that said milker was useless and worthless, and offered to return the same to it; denies that plaintiff ever offered to return said milker to this defendant; denies that plaintiff demanded from this defendant that it return to him the purchase price of said milker; denies that he demanded of this defendant any damages for the

injury done to his said cows by the operation of said milker.

XI.

Defendant further denies that on or about the 20th day of October, 1914, this defendant asserted, or ever asserted, that said mechanical milker was a fit and proper machine for milking plaintiff's cows; always stated that it knew nothing about mechanical milkers whatever; denies that it represented at the date above mentioned, or at all, that said milker could be successfully operated without injury to plaintiff's cows; denies that it insisted that it, or that both defendants, be permitted another [84] trial, or any trial, upon plaintiff's said cows; denies that it again represented and warranted, or ever represented or warranted that the said mechanical milker would not in any way injure plaintiff's cows; denies that it agreed to pay plaintiff all damage, or any damage, caused plaintiff's cows by said mechanical milker.

Denies that plaintiff consented to this defendant that it might have another trial, or any trial, of said milker; denies that on the 20th day of October, 1914, or at any other time, this defendant, alone, or in conjunction with its codefendant, began the operation of said mechanical milker of plaintiff's said cows and attempted to milk plaintiff's said cows therewith; denies that from the 20th day of October, 1914, to the 18th day of December, 1914, or at any other time, this defendant, either alone or in conjunction with its codefendant, operated said milker upon plaintiff's said cows; denies that during said time,

or at any other time, this defendant, alone or with its codefendant, had the sole care, custody and control of said machine; denies that it had anything to do with said machine at said time, or at any other time; denies that said mechanical milker, while being operated by this defendant, or by this defendant in conjunction with its codefendant, greatly injured said cows, or any of them, by bruising and diseasing the teats, udders and bags of said cows, or in any way injured said cows; denies that by reason thereof said cows were totally and permanently ruined for dairy purposes; denies that any of said cows were injured at all by the acts or omissions of this defendant; denies that on the 18th day of December, 1914, this defendant discontinued operating said milker; states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff's complaint, wherein plaintiff states that since the 18th day of December, 1914, said milker has not been used, and placing its denial on said ground, denies the same. [85]

XII.

Denies that on or about the 18th day of December, 1914, or at any other time, plaintiff, after a full and fair trial of said milker, or at all, notified this defendant of the insufficiency of said milker to do the things which defendant had represented and warranted it would do; denies that plaintiff notified this defendant as to any representations or warranties made by it, and the breach thereof; denies that plaintiff offered to return the said milker to this defendant at any time; denies that plaintiff demanded

that this defendant return to him the purchase price of said milker; denies that plaintiff demanded that this defendant pay him for the damage and loss to his said cows.

XIII.

Defendant further states that it has no information or belief upon the subject sufficient to enable it to answer the allegation of plaintiff's amended complaint wherein plaintiff alleges that before said Sharples' mechanical milker was used on his cows said cows were a valuable herd of healthy, well-bred, dairy cows, free from disease; that it has no information upon the subject sufficient to enable it to answer the allegation of said complaint that as a direct result of the efforts made in good faith to use the said mechanical milker as aforesaid two of said plaintiff's cows died from the injurious effects upon them of said milker, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars; that five were totally and permanently ruined for all purposes to plaintiff's damage in the sum of Six Hundred Seventy-five (\$675) Dollars; that ten were totally and permanently ruined for dairy purposes to plaintiff's damage in the sum of Seven Hundred Thirty (\$730) Dollars; that ten were injured, each by the loss of the use of one or more teats, to plaintiff's damage in the sum of Three Hundred (\$300) Dollars, making plaintiff's total damage Two Thousand Five (\$2,005) Dollars, and placing its denial on [86] said ground, denies the same.

Defendant further states that it has no information and belief sufficient to enable it to answer any

of the allegations in paragraph XIV of said plaintiff's amended complaint, and placing its denial on that ground, denies all of said allegations therein contained.

XIV.

Defendant further states that it has no information or belief sufficient to enable it to answer the allegation in plaintiff's complaint that as a direct result of his efforts made in good faith to use said mechanical milker he has suffered a loss of butter fat to the value of One Thousand Five Hundred (\$1,500) Dollars, and placing its denial on said ground, denies the same.

This defendant further states that it has no information or belief sufficient to enable it to answer the allegation of plaintiff that the purchase and installation of said mechanical milker cost the sum of One Thousand Seven (\$1,007) Dollars, and placing its denial on said ground, denies the same.

This defendant denies that there is now due, owing and unpaid, or due, or owing or unpaid, from this defendant, to plaintiff, the sum of Four Thousand Five Hundred Twelve (\$4,512) Dollars, or any part thereof, or any sum whatever.

WHEREFORE, defendant asks that it may go hence with its costs herein expended.

McPHERRIN & NICHOLS,

Attorneys for Defendant Edgar Bros. Company. [87]

State of California,

County of Imperial,—ss.

J. H. Edgar, being duly sworn, says: That he is the manager of the defendant Edgar Bros. Company,

in the foregoing entitled matter; that he has read the foregoing Amended Answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information or belief and as to those matters that he believes it to be true.

[Seal]

J. H. EDGAR.

Subscribed and sworn to before me this day of Mar. 4, 1916, A. D. 1916.

[Notarial Seal] WM. O. HINDERKS,
Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: No. 413-Civil. In the United States District Court, for the Southern District of Cal., County of Imperial, State of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, et al., Defendant. Amended Answer of Edgar Bros. Company, a Corporation. Received copy of the within Amended Answer this 7th day of March, 1916, Eshleman & Swing, Phil D. Swing, Attorney for Plaintiff. Filed Mar. 9, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. McPherrin & Nichols, First National Bank Building, Imperial, Cal., Attorneys for Defendant. [88]

*In the United States District Court, for the Southern
District of California, Southern Division.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROS. COM-
PANY, a Corporation.

Defendants.

Amendment to Amended Complaint.

Comes now plaintiff above named and by leave of Court first had and obtained, filed this an amendment to his amended complaint, adding two paragraphs thereto, and alleges as follows:

XIV $\frac{1}{2}$.

That of plaintiff's said cows so injured by the operation of the said mechanical milker on them as aforesaid, plaintiff was obliged to pasture eight head thereof for a period of twelve (12) months before he could get them in condition so that he could sell or dispose of them at all to his damage in the sum of \$132; and six head of said cows plaintiff was obliged to pasture for a period of twenty-four months in order to get them into condition so that he could sell or dispose of them, to plaintiff's damage in the sum of \$288.

XVI $\frac{1}{2}$.

That the reasonable value of said mechanical milker so sold to plaintiff as aforesaid was nothing whatsoever. That said mechanical milker, if it had

complied with the warranty given to plaintiff at the time of the purchase thereof, would have been of the reasonable value of One Thousand Dollars (\$1,000).

[89]

WHEREFORE plaintiff prays judgment against defendant for the amount stated in the prayer of his amended complaint.

PHIL D. SWING,
Attorney for Plaintiff.

State of California,
County of Los Angeles,—ss.

W. W. Skinner, being first duly sworn, says: That he is the plaintiff in the foregoing entitled matter, that he has read the foregoing amendment to the amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information and belief and as to those matters he believes it to be true.

W. W. SKINNER.

Subscribed and sworn to before me this 10th day of October, 1916.

[Seal] WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy.

[Endorsed]: No. Civ. 413. In the District Court of the United States, for the Southern District of California. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company et al., Defendants.

Amendment to Amended Complaint. Recd. Copy,
W. P. Smith & Bicksler, Smith & Parke, Attys. for
Deft. Sharples Separator Co. Edgar Bros. Co. Mc-
Pherrin & Nichols, Its Attys. Filed October 10th,
1916. Wm. M. Van Dyke, Clerk. By Chas. N. Wil-
liams, Deputy Clerk. Phil D. Swing, Attorney for
Plaintiff. [90]

At a stated term, to wit, the July Term, A. D. 1916,
of the District Court of the United States of
America, in and for the Southern District of
California, Southern Division, held at the court-
room thereof, in the city of Los Angeles, on
Tuesday, the tenth day of October, in the year
of our Lord one thousand nine hundred and six-
teen. Present: The Honorable OSCAR A.
TRIPPETT, District Judge.

No. 413—CIVIL, S. D.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
Defendant.

**Minutes of Court—October 10, 1916—Order
Continuing Cause.**

This cause having now, at the hour of 3:37 o'clock
P. M., been again called for further trial before the
court and a jury heretofore duly impanelled herein;
Phil D. Swing, Esq., appearing as counsel for plain-
tiff; E. E. Nichols, Esq., appearing as counsel for de-
fendant, Edgar Brothers Company; Willard P.

Smith, Esq., and Dale H. Parke, Esq., appearing as counsel for defendant Sharples Separator Company; A. S. Custer being present as shorthand reporter of the testimony and proceedings, and acting as such; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and W. W. Skinner, the plaintiff, as a witness in his own behalf, having again taken the stand for further examination, and having given his testimony; and Albert Skinner having been called and sworn as a witness on behalf of plaintiff, and having given his testimony; and, in connection with the testimony of said witness, plaintiff having offered a metal sign, which is admitted in evidence as Plffs. Ex. 6; and Ida Skinner having been called and sworn as a witness on behalf of plaintiff, and having given her testimony and plaintiff having rested; and defendant Edgar Brothers, a [91] corporation, having, through E. E. Nichols, Esq., its counsel, demurred to the proof offered by plaintiff, and moved for an order dismissing this cause as to said defendant; and the Court having given the jury the usual admonition; and the jury thereupon, at the hour of 4:37 o'clock P. M., having been excused until Wednesday, the 11th day of October, 1916, at 10 o'clock A. M., and a statement having been made by Phil D. Swing, Esq., of counsel for plaintiff; it is ordered that said motion to dismiss this cause as to defendant Edgar Brothers, a corporation, be, and the same hereby is granted; and Dale H. Parke, Esq., of counsel for defendant Sharples Separator Company, having moved for a nonsuit herein, it is ordered

that said motion for a nonsuit be, and the same hereby is overruled; and plaintiff having asked leave to introduce and read herein a deposition on behalf of plaintiff, upon which request no ruling is now announced by the court; it is ordered that this cause be, and the same hereby is continued until Wednesday, October 11th, 1916, at 10 o'clock A. M., for further trial.

[Endorsed]: No. 413 Civil, S. D. United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, Defendant. Copy of Order. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [92]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of Thirty-seven Hundred and Sixty-three Dollars and Ninety-two Cents.

Los Angeles, October 13th, 1916.

L. T. BRADFORD,
Foreman.

[Endorsed]: No. 413—Civil. U. S. District Court, Southern District of California. W. W. Skinner vs. The Sharples Separator Co. Verdict. Filed Oct. 13, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [93]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation, and EDGAR BROTHERS COMPANY, a Corporation.

Defendants.

Judgment.

This cause coming on regularly for trial on the 10th day of October, 1916, being a day in the July Term, A. D. 1916, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impanelled; Phil D. Swing, Esq., appearing as counsel for plaintiff; E. E. Nichols, Esq., appearing as counsel for defendant, Edgar Brothers Company; Willard P. Smith, Esq., and Dale H. Parke, Esq., appearing as counsel for defendant, Sharples Separator Company; and the trial having been proceeded with on the 10th, 11th and 13th days of October, 1916, and witnesses having been

sworn and examined, and documentary evidence having been introduced on behalf of the respective parties; and the Court having, on the 11th day of October, 1916, upon motion of counsel for defendant, Edgar Brothers Company, ordered that this cause be dismissed as to said defendant, and the taking of evidence having been proceeded with, and the evidence having been closed; after argument by counsel for the respective parties and the instructions of the Court, having, on said 13th day of October, 1916, been submitted to the jury, and the jury, on said 13th day of October, 1916, having rendered the following verdict: [94]

*"In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY,
Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of Thirty-seven Hundred and Sixty-three Dollars and Ninety-two Cents.

Los Angeles, October 13th, 1916.

L. T. BRADFORD,
Foreman."

—and the Court having ordered that judgment be entered herein in accordance with said verdict in favor of the plaintiff;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court, that the plaintiff, W. W. Skinner, do have and recover of and from the defendant, The Sharples Separator Company, a corporation, the sum of Thirty-seven Hundred and Sixty-three Dollars and Ninety-two Cents (\$3,763.92), together with plaintiff's costs in this action, taxed at \$266.04.

Judgment entered October 13, 1916.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 413-Civil. United States District Court, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, and Edgar Brothers Company, a Corporation, Defendants. Copy of Judgment. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [95]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation, and EDGAR BROTHERS
COMPANY, a Corporation,

Defendants.

**Certificate of Clerk U. S. District Court to
Judgment-roll.**

I, Wm. M. Van Dyke, clerk of the District Court
of the United States for the Southern District of
California, do hereby certify the foregoing to be a
full, true and correct copy of an original Judgment
entered in the above-entitled action and recorded in
Judgment Book No. 2, at page 380 thereof, for the
Southern Division; and I do further certify that the
papers hereto annexed, constitute the judgment-roll
in said action.

ATTEST my hand and the seal of said District
Court, this 19th day of October, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,
Deputy Clerk.

[Endorsed]: No. 413—Civil. In the District Court
of the United States for the Southern District of

California, Southern Division. W. W. Skinner vs. The Sharples Separator Co. et al. Judgment-roll. Filed Oct. 19, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Judg. Reg. Book No. 2, page 380. [96]

In the District Court of the United States, Southern District of California, Southern Division.

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation,

Defendant.

**Stipulation Extending Time for Preparing and
Filing Bill of Exceptions.**

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys, that the time within which the defendant, The Sharples Separator Company, may prepare, file and serve its bill of exceptions in the above-entitled action, to be used in support of a writ of error or appeal or for any other lawful purpose, be and is hereby extended and enlarged until and including Tuesday, December 5th, 1916.

Dated October 18th, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH, and
BICKSLER, SMITH & PARKE,

Attorneys for Defendant, The Sharples Separator
Company.

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation, Defendant. Stipulation Extending Time for Preparing and Filing Bill of Exceptions. Filed Oct. 21, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bicksler, Smith & Parke, 829 Citizens Natl. Bank [97] Bldg., Fifth & Spring Sts., Los Angeles, Cal. Telephones: A—2752; Main 5166, Attorneys for Defendant. [98]

*In the District Court of the United States, Southern
District of California, Southern Division.*

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Order Enlarging Time Within Which Bill of Exceptions may be Filed.

IT APPEARING that the parties hereto have, through their respective attorneys, by stipulation duly filed in this court, stipulated and agreed that the time within which the defendant, The Sharples Separator Company, may prepare, serve and file its bill of exceptions may be extended to and including the 5th day of December, 1916;

NOW, THEREFORE, upon application of the defendant, and pursuant to said stipulation, it is hereby ordered that the time within which the defendant The Sharples Separator Company may prepare, serve, and file its bill of exceptions, to be used in support of a writ of error, appeal, or other lawful purpose in this action, be and the same is hereby enlarged and extended to and including the 5th day of December, 1916.

Dated October 21st, 1916.

OSCAR A. TRIPPET,
District Judge. [99]

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation, Defendant. Order Enlarging Time Within Which Bill of Exceptions may be Filed. Filed Oct. 21, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth and

102 *The Sharples Separator Company*
Spring Sts., Los Angeles, Cal., Telephones: A-2652,
Main 5166, Attorneys for Defendant. [100]

*In the District Court of the United States, Southern
District of California, Southern Division.*

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Stipulation Extending Time for Preparing and Filing Bill of Exceptions and Granting Stay of Execution.

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys, that the time within which the defendant The Sharples Separator Company, may prepare, file and serve its bill of exceptions in the above-entitled action, to be used in support of a writ of error or appeal or for any other lawful purpose, be and is hereby extended and enlarged until and including Friday, December 15th, 1916.

IT IS FURTHER STIPULATED THAT a further stay of execution to and including said 15th day of December, 1916, may be granted.

Dated November 20, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,

Attorneys for Defendant, The Sharples Separator
Company.

It is so ordered.

TRIPPET,
District Judge. [101]

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., a Corporation. Stipulation Extending Time for Preparing and Filing Bill of Exceptions, and Granting Stay of Execution. Filed Nov. 20, 1916. Wm. M. Van Dyke, Clerk. By Geo. W. Fenimore, Deputy. Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth and Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, Attorneys for Defendant. [102]

*In the District Court of the United States, Southern
District of California, Southern Division.*

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff, *vs.*

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Stipulation Extending Time for Preparing and Filing Bill of Exceptions and Granting Stay of Execution.

IT IS HEREBY STIPULATED by and between the plaintiff and defendant, through their respective attorneys, that the time within which the defendant The Sharples Separator Company may prepare, file and serve its bill of exceptions in the above-entitled action, to be used in support of a writ of error or appeal, or for any other lawful purpose, be, and is hereby extended and enlarged until and including Saturday, December 23d, 1916.

IT IS FURTHER STIPULATED that a further stay of execution to and including said 26th day of December, 1916, may be granted.

Dated December 6, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
Attorneys for Defendant, The Sharples Separator
Company.

It is so ordered. 12/23/16.

TRIPPET,
District Judge. [103]

[Endorsed]: Original. No. Civil—413. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Stipulation Extending Time for Preparing and Filing Bill of Ex-

ception and Granting Stay of Execution. Filed Dec. 23, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth and Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, Attorneys for Defendant. [104]

In the District Court of the United States, Southern District of California, Southern Division.

NO. CIVIL—413.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation,

Defendant.

Stipulation Extending Time for Preparing and Filing Bill of Exceptions and Granting Stay of Execution.

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys that the time within which the plaintiff, W. W. Skinner, may prepare, file and serve his proposed amendments to defendant's proposed bill of exceptions in the above-entitled action, be and *he* is hereby extended and enlarged until and including Wednesday, January 31st, 1917.

IT IS FURTHER STIPULATED that a further stay of execution to and including the said 15th day of February, 1917, may be granted.

Dated December 20th, 1916.

PHIL D. SWING,
Attorney for Plaintiff.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
Attorneys for Defendant, The Sharples Separator
Company.

It is so ordered.

TRIPPET,
District Judge. [105]

[Endorsed]: 413—Civil. In the District Court of the United States, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation. Stipulation Extending Time for Preparing and Filing Bill of Exceptions and Granting Stay of Execution. Filed Jan. 26, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Phil D. Swing, Attorney for Plaintiff. [106]

At a stated term, to wit, the January Term, A. D. 1917, of the District Court of the United States, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the 26th day of January, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

NO. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

SHARPLES SEPARATOR COMPANY et al.,
Defendants.

**Minutes of Court — January 26, 1917 — Order
Extending Time to File Bill of Exceptions.**

On motion of Dale H. Parke, Esq., of counsel for defendants, it is ordered that said defendants be, and they hereby are, granted five (5) days after the filing of proposed amendments to the proposed bill of exceptions herein within which to present said bill of exceptions and amendments for settlement. [107]

At a stated term, to wit, the January Term, A. D. 1917, of the District Court of the United States, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and seventeen: Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 413—CIVIL S. D.

W. W. SKINNER,

Plaintiff,

vs.

SHARPLES SEPARATOR COMPANY et al.,
Defendants.

Minutes of Court—February 6, 1917—Order Extending Time to File Bill of Exceptions.

On motion of Dale H. Parke, Esq., of counsel for defendants, Phil D. Swing, Esq., of counsel for plaintiff being present and objecting thereto, it is ordered that the time of defendants to present the bill of exceptions herein for settlement be extended, and that the same be, and hereby is set down for settlement for Saturday, the 10th day of February, 1917, at 10 o'clock A. M. [108]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPERATOR CO., et al.,
Defendants.

**Objections to Presentation, Settlement and Signing
of Bill of Exceptions.**

Comes now plaintiff W. W. Skinner, at the time fixed for the presentation of the above bill to the Judge for settlement and signing but before the same is presented, settled or signed, to wit, on the 6th day of February, 1917, and duly enters his objection to the presentation, settlement and signing of the same on the ground that the bill of exceptions was not presented to the judge for settlement and signing, nor

was the same settled and signed within the term of court at which the trial was had and judgment rendered and entered, nor was there any stipulation of the parties or order of the Court made within said term extending the time for the presentation, settlement and signing of said bill of exceptions after the expiration of said term and that the only order made extending defendant's time for presenting, settling, and signing said bill was made after the expiration of said term, to wit, on the 26th day of January, 1917, to the making of which said order plaintiff never consented.

Dated February 6, 1917.

PHIL D. SWING,
Attorney for Plaintiff. [109]

[Endorsed]: 413-Civil. In the *Superior* Court of the United States in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Co., et al., Defendants. Objections to Presentation, Settlement and Signing of Bill of Exceptions. Recd. Copy of Within Objections this 6th Day of Feby. 1917. Willard P. Smith, Bicksler, Smith & Parke, Attorneys for Defendant, The Sharples Separator Co. Filed Feb. 6, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Phil. D. Swing, Attorney for Plaintiff. [110]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 413.—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR CO., a Corpora-
tion, and EDGAR BROS. CO., a Corporation,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled action came on regularly for trial on Tuesday, October 10, 1916, at 10 o'clock A. M. of that day, before Hon. Oscar A. Trippet, Judge sitting in *and* above-entitled Court, with a jury, the above-named plaintiff being represented by Phil. D. Swing, Esq., of El Centro, California, and the above-named defendant, The Sharples Separator Co., a corporation, by Messrs. Willard P. Smith, of San Francisco, California, and Dale H. Parke, of Bicksler, Smith & Parke, of Los Angeles, California, and the defendant Edgar Bros., Co., a corporation, by Messrs. McPherrin & Nichols, of El Centro, California, and the following proceedings, and none other, were had, and the following evidence, and none other, was received. A jury was duly impaneled and sworn to try said cause, and thereupon an opening statement of said cause was made to said jury by counsel for plaintiff. [111]

Testimony of W. W. Skinner, in His Own Behalf.

Thereupon W. W. SKINNER, the plaintiff in said action, was called as a witness in his own behalf, and after having been first duly sworn, testified as follows:

Direct Examination.

My name is W. W. Skinner. I live at El Centro, Imperial Valley, California, where I have lived something over five years. I am engaged at present in dairying and ranching; I have been in that business in Imperial County something over five years. At the beginning of the year 1914, I was milking three strings of dairy cows—approximately anywhere from 85 to 100 cows; usually we constitute 30 cows a string; sometimes it will run two or three cows over and sometimes a little less—we were milking approximately 90 cows at that time. I had a selected herd of cattle that I had been selecting for since 1911, I began on that herd and I had been cutting out the poor milkers until I had built up an extra good herd of cattle.

About the first of the year 1914, I had negotiations looking towards the purchase of a mechanical milker, at my home, three miles east and north of El Centro; these negotiations were opened by one Mr. Hickson on behalf of The Sharples Separator Company people. Up to that time, I did not know anything about the Sharples Separator Company, or about any mechanical milker. Their sales agent delivered to me certain printed literature published by The Sharples

(Testimony of W. W. Skinner.)

Separator Company, which I read and believed and acted on; I bought a milking machine. [112]

Q. I will ask you to examine this printed matter, and ask if you are able to identify that?

(Handing witness paper hereinafter referred to as Plaintiff's Exhibit 2.)

A. Yes; he had here some things that I recognize; some of these things possibly I would not recognize, but there are some things here that I do. In reading his stuff, the thing that attracted my attention most were the things that would be of most help. I was looking, figuring on buying a machine, and the things that would be of the most importance to me attracted my attention most. This printed matter, or one substantially like it, was presented to me by Mr. Hickson during the negotiations for the purchase of The Sharples Mechanical Milker. This is the contract signed by me.

(Thereupon, said contract was received and read in evidence in said cause, and marked Plaintiff's Exhibit 1, and was and is in words and figures as follows:)

“SHARPLES MILKER ORDER BLANK.

Date 1/2, 1914.

Sharples Separator Co.,
San Francisco, Cal.

Please enter my order for the following Sharples Milker Equipment to be delivered as soon as possible. This order is subject to the conditions of sale and

(Testimony of W. W. Skinner.)

guarantee printed on the reverse side of this sheet.

1 six inch Pumps

Units and Equipment installed complete with instructions to my operators. Less transportation charges on outfit. Power, Belting, Countershafting, etc., not included in this Equipment.

Price \$476.65 (\$76.65—S.D.B.L.)

| | |
|------|------------|
| \$50 | —30 days |
| 50 | —60 days |
| 50 | —90 days |
| 250 | —120 days. |

I agree to furnish board and lodging for installer free of charge. All terms and agreements of this order appear hereon in writing.

Signed—W. W. SKINNER,
Purchaser. [113]

Prices F. O. B. San Francisco, California. Shipping Instructions.

CONDITIONS OF SALE.

This sale is made with the understanding that the purchaser will have the machine operated and cared for in accordance with out instructions. This is necessary for the profit and satisfaction of the purchaser and for the protection of the manufacturer.

Special attention is called to the following points:

That the machine be kept in good order mechanically.

That the pressure and vacuum adjustment shall be maintained in accordance with instructions.

That the cows be carefully and thoroughly stripped after each milking.

(Testimony of W. W. Skinner.)

That the machine be thoroughly cleaned after each milking and that all reasonable precautions tending to the production of clean milk be observed.

GUARANTEE.

The Sharples Milker is sold under this order is hereby GUARANTEED AGAINST ALL DEFECTS OF WORKMANSHIP OR MATERIAL and any part found to have been defective when shipped, will be replaced by the company without charge, F. O. B. its works provided the defected part is returned within one year from purchase and provided a written notice is sent to the company by the purchaser. Ordinary wear and tear, accidents or abuse are not included in this guarantee.

The company further guarantees this machine to be in all respects as represented in its printed matter, and to be capable of doing the work as claimed therein."

Mr. SWING.—We now offer the printed matter identified by the witness.

Mr. PARKE.—We object to it as incompetent, irrelevant and immaterial; this is a case of a written warranty.

Said objection to the introduction of said printed [114] matter was then and there overruled by said Court, to which ruling said defendant Sharples Separator Company, a corporation, then and there duly excepted; and said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Testimony of W. W. Skinner.)

EXCEPTION NUMBER 1.

The printed matter last hereinabove referred to was then and there marked by the clerk of said court as Plaintiff's Exhibit No. 2, whereupon plaintiff, through his counsel, read to the jury the following paragraphs from said printed matter:

"A lifetime study in the dairyman's interest enabled these experts to solve the apparently impossible problem of automatic or mechanical milking."

"The gentle massage of the teat cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production."

"The teat cup with upward squeeze always is soothing, even tempered, never in a hurry. After drawing each squirt of milk it gently massages the cow's teats, keeping the teats and udder of the most delicate or hardiest cow in a soft, cool, natural, perfect condition, free from congestion."

"By the proper use of this all-important feature, which is obtainable only in the Sharples Milker, the teats and udder of either the most delicate or the most hardy cows are kept in a soft, cool, natural condition. Until we made this discovery, we never thought of offering a machine for sale, though long before that time we were owners of patents on the best pulsating suction milkers [115] ever devised."

These statements merit special consideration. They are conservative—"

Q. I will ask you to examine this piece (handing paper to the witness).

(Testimony of W. W. Skinner.)

A. Yes, sir; this printed pamphlet, or one like it, was given to me by the agent of the Sharples Separator Company during the negotiations for the sale of their machine.

Mr. SWING.—We offer this printed matter of the Sharples Separator Company in evidence.

EXCEPTION NUMBER 2.

Mr. SWING.—(Addressing the Jury.) I will read you that portion of the printed literature of the Sharples Separator Company which I deem pertinent. (Reading:—)

“The Sharples Mechanical Milker is quite different from others which give the teats an upward squeeze, which not only absolutely prevents all irritation of teats and udders but actually benefits the cows and improves the flow of milk.” [116]

The WITNESS.—(Continuing.) I have examined this printed matter; this little pamphlet, or one like it, was left with me pending negotiations and I relied upon the representations contained in there.

Mr. SWING.—We offer this in evidence as Plaintiff’s Exhibit 4.

Mr. PARKE.—We object to it as incompetent, irrelevant and immaterial.

Said objection to the introduction of said little pamphlet, Exhibit No. 4, was then and there overruled by said Court, to which ruling said defendant Sharples Separator Company then and there duly excepted; and said defendant said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Testimony of W. W. Skinner.)

EXCEPTION NUMBER 3.

Mr. SWING.—The statements herein contained are in the form of questions and answers. I will read those pertinent to this case. (Reading:)

“Q. Is it safe to milk high-grade cows with the Milker?

A. This question has already been answered pretty thoroughly. The high-grade cow is much safer when milked by the Sharples Milker than when milked by hired help and just as safe as when milked by the owner himself.

“Q. Does it not have a harmful effect on some cows?

A. From our knowledge of what the milking machine has accomplished on the 80,000 cows upon which it is used daily, we know that the Sharples Milker has a tendency to increase the production of milk. Of some cows it does not seem to increase the production, of others it increases it anywhere up to 10%. [117]

“If the hand milkers have been poor, the Sharples Milker practically always shows an increase in milk production. The reason for this is that the ‘upward squeeze’ keeps the teats in perfect condition. The cows are milked with an even and regular motion studied by us and made correct. If the hand milkers were very good it is probable that the machine will not be able to improve upon them; otherwise, the probabilities are that it will. We know positively that the Sharples Milker never has an ill effect upon the cows, provided the machine is

(Testimony of W. W. Skinner.)

kept in reasonable order, and we keep enough experts out on the territory to see that all dairymen do keep their machines in good order.

"There is not the least tendency to dry up the cows prematurely nor have any other harmful effect."

The WITNESS.—(Continuing.) At the time I purchased the three units, there was something said as to my purchasing an additional unit if I so desired; he said that any time I wanted to add another unit, I could add one more, two more or three more, just as I thought proper, at any time. All I would have to buy was the bucket and its fixtures; that is, its unit of bucket, pulsator, and the teat cups, and the other *fixtures* that go with it. The three units arrived on February 1, 1914. After I had purchased the machine and the machine had come, the Sharples people sent Mr. Reed to install the machine; he did so; he was to install the machine and instruct my men and me as to how to run and operate the machine, and was to stay until he was satisfied and we were satisfied that we could operate the machine. He installed the machine and proceeded to run it, start it up and got it to going; and after the machine was installed and we got [118] everything going, he said he thought the boys could run it all right with my help and with assistance from the printed literature he had left there with the different instructions he left. We proceeded to milk the cows with the machine; it took the milk away from the cows all right; and after we had been running the machine some length of time, I saw that the third unit was

(Testimony of W. W. Skinner.)

not practicable for two men—the two men could take the two units a piece and operate the two units; each man would milk and strip his own cows and we could get along faster; they could manage the work better; so I went to Mr. Edgar Bros. and told him I wanted another unit. I could not tell you just how long it was before I ordered the other unit; I ordered the machine and it seemed there was some delay before the machine came, and, if I recollect right, it was along in April or May before the other unit came. I would not be positive of the time. Mr. Reed told me I could purchase another unit at any time; all there would be to do would be to hook it on to the pipes the same as the other units. Edgar Bros. knew what I was going to do with the fourth unit. I had been running the machine; the fourth unit came; trouble began to develop; my cows began to have swollen quarters; and by swollen quarters I mean one teat, two teats, three teats and sometimes four. That constitutes the quarter on a cow's udder, a teat and the part above it. Sometimes there would be one quarter, two quarters, three quarters swollen and hard, and before this fourth unit came, this trouble began to develop. I told Mr. Edgar there is trouble here, and I didn't like it. When the first cow had a hard quarter, this same Mr. Hickson landed at my place with a bunch of men to show the machine to [119] and demonstrate it. I said, "Mr. Hickson, what does this mean, over here? This cow is in a condition that I never had before. I don't know what to do about it. What is the trouble? Has the

(Testimony of W. W. Skinner.)

machine done it?" He replied, "Oh, no, no, no; the machine did not do it; that is just some local trouble that probably caught the bag, it ought not to swell it." And I went and took the cow off and began to milk it by hand, rubbed and tended to it and cared for it until it came back to practically normal; and when this fourth unit came, I said to Mr. Edgar, "This doesn't look good to me; I am not going to pay for this unit until I see whether it is going to work right";—and I never did pay for the fourth unit. They was to send this demonstrator there once a month to go through my herd and see if everything was working all right.

Mr. PARKE.—We move to strike out the last statement of the witness as to the duties on the part of the Sharples Company.

Said motion to strike out was then and there denied by said court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 4.

The WITNESS.—(Continuing.) In all cases, I took the cow off the milker whenever I found a cow with a swollen quarter, and by the latter part of June—June 25th—I had a string of thirty cows off—however there was two of these cows out of the thirty that never would milk with a milking machine. Up to June 25th, none of the cows had sustained any permanent injury.

In the month of June, Albert J. Reed returned;

(Testimony of W. W. Skinner.)

I [120] know how he came to come back; I went to Imperial to Edgar Bros. and told them that I—he asked me when I went into his place of business—he asked me how I was getting along with this machine; I said I am not getting along at all, I am milking thirty by hand." He said, "Well, I will have to see about it," or I don't know just what; a few days later Mr. Reed appeared upon the scene. He proceeded to take charge of the milking machine, and put these cows back on the machine—the entire herd including those that had previously been injured. He ran the machine practically two weeks. The cows developed those swollen quarters and swollen bags to the extent that they were not worth anything for dairying purposes; the bags were ruined. The milk would not come through the bags; the bags swelled up; and later two of these cows came fresh, and when they come fresh their udders and bags were in such a condition that there could nothing come out. The calf could not get anything out, and you couldn't get anything out of it; the bag just begin to swell and swell until it began to swell all over and die. The cows had not been exposed to any contagious disease. I had a veterinary examine them. Three cows died. As to the other cows, their bags were just swelled. As nearly as I could explain how their bags were, if you go and bruise your hand or bruise your leg, and it were to raise up in an old boil in two or three days it come to a head and if you would *lit* that open it would run out corruption. Pus came out of the teats, where it could come out.

(Testimony of W. W. Skinner.)

There were two of the cows I saw were going to die if there was not something done and I took my knife and cut the udder open, and the whole thing just ran out—from two of the cows—the udders were rotten and had a bad odor.

During Mr. Reed's time, he had a veterinary; he examined the cows and gave a prescription; Mr. Reed and myself [121] and another man that I had, we gave this prescription according to directions, and I took this one man and put him in the corral, segregated those cows from the herd, and told this man, "Don't you do anything else in the world but tend to these cows—just stay right here and try to keep them from dying and save what you can," which he did. Prior to my putting the milking machine on these cows, I never had anything in the nature of a swollen quarter.

After Reed left on the 7th of July, the milker was not run any more, and lay idle until the latter part of October. When Mr. Briggs appeared on the scene one day and told me he had come down to straighten up the milking machine business with me. I had never seen him before.

The COURT.—State what Briggs did.

The WITNESS.—I can't well state what he did without I tell you what passed between us. Briggs, he wanted to start the machine again and I would not agree to it.

Mr. PARKE.—We move to strike that out as to what Briggs wanted to do.

Said motion to strike out was then and there de-

(Testimony of W. W. Skinner.)

nied by said Court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 5.

The COURT.—Just what did you do?

The WITNESS.—I finally agreed that if they would take charge of the machine on 30 cows—

Mr. PARKE.—If the Court please, we object to any agreements entered into by and between Skinner and Mr. [122] Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty; Briggs had no authority to contract.

Said objection was then and there overruled by said Court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 6.

The WITNESS.—Briggs wanted to start the machine. I told him I would not let him do it. That was first. He then came back again. He and I went to Mr. Edgar Bros. and we came to an agreement. That agreement was later put into writing; this is the writing I entered into; my signature is at the bottom there; that is my signature; this H. S. King is Mr. Edgar Bros man—I desired a witness. But for my receiving this written paper, I would not have allowed Reed to restart the machine.

Thereupon plaintiff offered in evidence a purported agreement, to the introduction of which in

(Testimony of W. W. Skinner.)

evidence said defendant Sharples Separator Company, a corporation, objected as irrelevant and incompetent, and incompetent as it involves representations other than those appearing on the written guaranty. A ruling upon the admissibility of said purported agreement and the objections of said defendant Sharples Separator Company, a corporation, to the admission in evidence of said document was by said Court deferred pending argument of counsel.

The WITNESS.—(Continuing.) Before the time when Briggs came, there were 20 cows ruined—I mean ruined for dairy purposes; and by ruined for dairy purposes I mean that they were not any good for dairy cows; those cows that [123] had not died were worth their price for beef. They were not worth anything at all for dairy cows. Prior to the time they were hurt, they would be worth \$250, \$200, \$150, \$125, and \$100. There were five Guernsey cows worth \$1100; after they were hurt they were worth \$50 apiece for beef. There were three of them valued at \$200 apiece and two of them at \$250 apiece. One of the Guernsey cows died. I had ten Jersey cows ruined. Five of those Jersey cows were worth \$125 apiece prior to their injury; and afterwards, I got \$250 for the five of them for beef, \$50 apiece. I had five other Jersey cows valued at \$100 apiece, that is, \$500; one of those \$100 cows died; afterwards, I got 50 apiece for the rest of them. I had two Durham cows valued at \$100 apiece. One of those cows died; I got \$50 for the other one. There were ten

(Testimony of W. W. Skinner.)

more cows that were ruined; seven of these were after Briggs came, three of them were before Briggs came; they were ruined for dairy purposes. I sold them for beef for \$50 apiece; they were worth \$80 apiece at the time they were injured. Those cows were worth what I asked for them; that was their market value; I wouldn't have took the market for them at the time they were injured. My total after crediting them with \$50 apiece for those that I was able to sell is \$2,025.

Q. And how long did you have to pasture them before you were able to sell them?

A. I kept 8 of those cows—sold 8 of those cows in June, 1915.

Q. That would be one year after they were injured? A. I received \$400—

Mr. PARKE.—We move to strike out the testimony as [124] to pasturing the cows, it being incompetent, irrelevant and immaterial, no special damage of that sort alleged; there is no prayer for any damage save and except the injury to the cows. Whatever damage was suffered, if the defendant were liable, if that were competent as of that date, you can't pay for pasturage; if you could, you could charge us indefinitely for pasturage.

The COURT.—None of that is in your complaint?

Mr. SWING.—It shows the net amount to which he was entitled.

The COURT.—You may amend your complaint if you wish to; the objection will be overruled.

Mr. PARKE.—Note an exception.

(Testimony of W. W. Skinner.)

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

EXCEPTION NUMBER 7.

Q. Did you suffer any loss as the result of the operation of this milker upon your herd in the quantity or amount of milk or butter fat you received from that herd?

Mr. PARKE.—We object to the question as calling for the conclusion of the witness.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

EXCEPTION NUMBER 8.

The WITNESS.—I did. The other cows this milker was used on that were not injured went off on their milk; the only way I have of getting how much less milk they gave is in my cream sheets. These cows were injured during the last days [125] of June and the first days of July; in June and July my cream check dropped \$142.13; it never did go back up again. If they had not used this milker the cows would, in my opinion, have held up. The milk that I lost by reason of this amounts, I think, to \$1500—the value of it.

Said defendant, said Sharples Separator Company, a corporation, thereupon moved to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion; said motion

(Testimony of W. W. Skinner.)

was then and there denied by said Court, to which said ruling defendant Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 9.

The WITNESS.—(Continuing.) The reasonable value of this milking machine in the condition in which it was found to be by me after I bought it, is that it was not worth anything; if it had been the way it was represented by the company it would have been worth a thousand dollars.

At this point, the jury retired from the court-room and the Court heard argument by counsel as to the competency of the purported agreement alleged to have been entered into in October, 1914, between the plaintiff personally and said defendant Sharples Separator Company, a corporation, by one F. L. Briggs; and said Court then and there ruled that such purported agreement was not competent evidence in this case and sustained the objection made thereto by the defendant Sharples Separator Company, a corporation.

Thereafter, said jury returned into court, and the following proceedings took place:

Mr. SWING.—In accordance with the suggestion made [126] this morning, I prepared an amendment to the amended complaint, covering more in detail the question of damages, and I have served a copy upon Mr. Parke, and I would like leave to file the amendment.

Mr. PARKE.—We object to the filing of the

(Testimony of W. W. Skinner.)

amended complaint upon the grounds that it attempts to set out elements of damage not set out in the original complaint, or in the bill of particulars furnished by the plaintiff; and that the defendant, Sharples Separator Company, a corporation, has had no opportunity of investigating the question of damage set out in the amendment; and that at this time, the plaintiff should not be permitted to insert other and different claims for damages than those covered by his original bill of particulars and complaint.

Said objection was then and there overruled by said Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns the said ruling as error.

EXCEPTION NUMBER 10.

Mr. PARKE.—I suppose it is stipulated that this amendment to the amended complaint may be deemed denied?

Mr. SWING.—I will so stipulate, yes.

Thereupon, the witness W. W. Skinner was recalled, and his direct examination reassumed as follows :

The WITNESS.—I quit using the machine in June. Biggs came there in October. I had not used it until that time. I had not intended to use it any more.

Q. After Biggs came, you started in to use it again?

A. Well, no; I didn't use it. Mr. Reed had—he did all the using; he did everything to it; I never touched it, [127] and none of my men—I gave my

(Testimony of W. W. Skinner.)

men strict instructions not to touch the machine under any conditions. Mr. Reed used it after Briggs came there.

The COURT.—Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

Mr. PARKE.—I dislike to object to the Court's questions, but we object to the question as to the conditions under which he started the use of the machine.

Said objection was then and there overruled by said Court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 11.

The WITNESS.—A. Yes, sir. In October, the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the machine on a string of cows; Mr. Reed and Mr. Briggs were there when the machine started, and they selected their cows that had not been injured—young cows—and then selected a herd that they thought the machine would milk—I do not know that they thought that, at least they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted; I had nothing to do with selecting the cows. The machine had gotten dirty; they took those things and boiled them, and put in new rubbers and started them up on those thirty cows. Mr. Reed had abso-

(Testimony of W. W. Skinner.)

lute control of it; I had nothing to do with it at all. It had not been there but just a little bit and the cow came into the corral with one of those bad quarters. I had cows that had not been milked [128] with the milker in that herd; there were two strings; some of those cows had had the milker on them in June and July. I had cows that this milker was not put on at any time; it is a hard question to answer how many; I had some young cows. No cows got diseased that were not milked with that milker. Up to July, they milked all the cows with the milker; I had some cows that came in after that that were not milked with the milker; but they selected some of those cows that had come in—young cows, and put the machine on them in October and November. After October, seven of the cows were hurt and some of them injured; I only claim those absolutely ruined for dairy purposes; some of them were injured that I put in no claim for. As to the value of those cows that I say were ruined, I would have to get my instructions out again to segregate those different cows.

Q. What do you mean by instructions?

A. I will show it. I just made a list from my books, the day-book, and when I want to get at this, and that is the only way I could remember it, was to set these different cows down at the different places, and that was the only way I could keep that. I made this memorandum myself—just a memorandum, that is all there is to it. Those seven cows were worth \$80 apiece, and after they were injured they were worth \$50 apiece.

(Testimony of W. W. Skinner.)

Mr. SWING.—Q. With reference to the guarantee which he gave you, or purported to give you at the time you consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee? [129]

Mr. PARKE.—We object to the form of the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor.

Said objection was then and there overruled by said Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 12.

The WITNESS.—They did notify me.

The COURT.—Did they ever notify you that Briggs was not their agent and had no authority to do what he did do?

EXCEPTION NUMBER 13.

The WITNESS.—No, sir.

Mr. PARKE.—We move to strike out the answer of the witness.

Said motion to strike out was then and there denied by said Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 14.

The WITNESS.—(Continuing.) I do not know

(Testimony of W. W. Skinner.)

who selected [130] Reed to operate that machine. Mr. Briggs asked me when he wanted to send a man if I had any preference as to whom he sent. I told him I did not; I said "You will do." He said, "I can't do it, I am too high priced a man; the company would not leave me here anyhow; I have no time; how will Reed do?" I said, "Reed will do all right; you can send anybody you want. It is up to you people, the Sharples Separator Company." While Reed was working on my ranch from October 20th to December 20th, he was in regular communication with F. A. Frank, Pacific Coast manager of the Sharples Separator Company; he received letters, of which I read two. I am not able to identify, from the substance of these letters or any of them, that these are the copies of letters that I saw Reed have; I never read either one of these. I read two letters, and neither of these are the letters.

Mr. SWING.—Q. At the time Albert J. Reed quit, if he did, on December 20, state what, if anything, he said at the time he quit.

A. When Mr. Reed quit?

Q. Yes.

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial; and there is no evidence before this Court of any kind, nature or description that Reed was agent of the Sharples Separator Company.

Said objection was then and there overruled by said Court, to which ruling said defendant Sharples Separator Company, a corporation, then and there

(Testimony of W. W. Skinner.)

duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 14-A.

The WITNESS.—A. The first intimation that I had [131] that Mr. Reed was going to quit, I walked into the corral and there was one of the cows showed that she was not feeling good, and I was in a hurry and was going to the ranch, and I said, "Mr. Reed, is that cow sick?" He said, "Look at her bag." And I just stopped, and it was a heifer and the bag was all swollen up, and I didn't say a word, and Mr. Reed didn't for half a minute, and then Mr. Reed said, "Skinner, I am going to quit; I have ruined the last cow with this machine that I expect to ruin." He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made in my presence a statement to Mr. Edgar regarding his ability or inability to run the machine.

The WITNESS.—(Continuing.) Reed quit. After he went in town, he sent Mr. Frank a telegram. I saw the telegram written; it was written by Mr. Reed.

Q. Do you know his handwriting; are you able to identify that (handing paper to the witness)?

A. It is very much like it. I believe it is.

Mr. SWING.—We offer now in evidence the copy written by Reed, which is attached to this deposition in which Reed testified in his handwriting, and which he wrote and also the original furnished by the Company, which is word for word like this. I offer the two. [132]

Mr. PARKE.—We object to that as incompetent,

(Testimony of W. W. Skinner.)

irrelevant and immaterial; and further that no evidence is before the Court that Reed was agent for the Sharples Separator Company, or any other employee at this time.

Said objection was then and there overruled, by said Court, to which said ruling said defendant Sharples Separator Company, a corporation, then and there duly excepted and now assigns the same as error.

EXCEPTION NUMBER 15.

Mr. SWING.—I will read this to the jury:

“Dated El Centro, California, December 18, 1914.
(Reading:) Sharples Separator Co., 420 Mission Street, San Francisco. Have done everything possible. Serious trouble started again. Taking too big risk to continue use of machine. We have discussed every possible phase of situation, but quit milking, safest way, or we will have too big a loss, according to our agreement. Will await instructions here. Wire at once. Albert J. Reed.”

Said telegram was then and there marked by the Clerk as Plaintiff's Exhibit 5.

After Reed quit on the 20th of December, 1914, I did not again operate the milker; it has never been operated since. I offered to return the machine to Mr. Edgar; I offered to return it to Mr. Edgar Bros. man; and I also told Mr. Reed, “It was your machine,”—I told Mr. Reed that in July, and when he quit the last time I told him the same thing. I said, “I don't want it any more,” and he went off and left the buckets and the units sitting out there in the

(Testimony of W. W. Skinner.)

yard. I have not had any udder trouble, [133] swollen quarters, or anything of that kind, since the milker was quit being operated. I have met the Pacific Coast agent for the Sharples Separator Company in the spring of 1915, Mr. F. A. Frank, at my home; he examined my cows that I had injured.

Q. What else did he do there, if anything; did he make any statements relative to the injury?

Mr. PARKE.—We object to any statements being made here on the ground that there is no evidence before this Court that Mr. Frank then had any relation to the Sharples Separator Company; and upon the ground that if any statements were made, they were made in the course of an offer to adjust or compromise this matter, and would not be binding upon either Mr. Skinner or the Sharples Separator Company.

The WITNESS.—My conversation with Mr. Frank was in relation to an adjustment or settlement of the matter between me and the Sharples Separator Company.

Mr. PARKE.—We renew our objection; we object, of course, to any admissions made in the course of a compromise; and irrespective of whether it was a settlement or not, we object to any admissions on the ground that the general manager had no right to make admissions or bind the company by any admission—he cannot give away the property of the company by admissions.

The COURT.—Objection sustained.

(Testimony of W. W. Skinner.)

Cross-examination.

I did not have an understanding with Mr. Reed when he came down there on the 20th day of October, that I [134] should pay him \$75 a month; I had no arrangements at all about paying Mr. Reed for the time he should be there; I did not trade with Mr. Reed; I did not consider Mr. Reed in it at all. I did not send for Mr. Reed when he came down to my place in April; if I remember rightly, why, I notified Mr. Edgar I had had some trouble, and Mr. Reed appeared on the scene immediately afterwards. I first began to use the machine about the 7th of February, I think; and I think I received the fourth unit from Edgar Bros. in May; and I took the fourth unit from Edgar Bros. and connected it up and used it after that—after May. I had had other trouble before I got the fourth unit. As to what cows I used the fourth unit on, I used the fourth unit the same as the others. The four units, as nearly as a man could look at them and say, were identically alike; if a man was to hand that unit up and another unit up, he could not go and pick out which were those units. I kept no record of the cows upon which the particular units were used. I did not make or keep any record of the amount of milk obtained from each individual cow.

Q. Well, you have set out in your bill of particulars furnished to the defendant the amount of butter fat which you received from your cows during the month of January, the month before you began using the machine, at 1619.77 pounds; is that correct?

(Testimony of W. W. Skinner.)

Mr. SWING.—I will stipulate; I compiled that myself; there is no question about that.

Mr. PARKE.—Do I understand, then, it is stipulated that that is the amount of butter fat he received in January?

Mr. SWING.—Yes. [135]

The WITNESS.—Mr. Parke, will you please run off the total of that at the price?

Q. (By Mr. PARKE.) There was no price, Mr. Skinner, during the month of January, on your bill of particulars.

A. Well, those figures run right on down there, various sums.

Q. 22 to 25 cents, I know, but the pound there of butter fat.

A. Take the first one there and multiply the pounds of butter fat with the price.

Q. Well, there is no price set for January.

A. There is 22 cents there.

Q. No; there is not.

A. Doesn't it say 22 cents?

Q. It is stated for March, 22 cents,—stated for January and February. Now, Mr. Skinner, did you determine the amount of butter fat which you obtained from your herd during the year of 1914?

A. How did I obtain that?

Q. How did you estimate? How can you estimate the amount of butter fat which you obtained during the year 1914?

A. I can go to the creamery and get their slips. I went to the creameries to which I sold my butter fat

(Testimony of W. W. Skinner.)

and got the slips. I have not got the amount of cash which I received for butter fat in January, 1914; I could not tell you the amount. There are two or three different ways of arriving at the damage of \$1,500 for loss of butter fat. In June, my cows were averaging better than \$6 a piece for the butter fat. There were 20 of those cows knocked out the last of June or the first of July. You multiply the number of [136] cows that were out of the herd by the average; those cows that were injured were over average cows. That is the way I arrived at the amount of butter fat I lost each month. You take the average of the herd and you multiply it by the number of cows that went out of the herd and were injured, and multiply that then by the number of months between the time these cows went out and I brought this suit. I estimated the loss of butter fat up to the time this suit was brought; I computed the loss of butter fat right down to the date this suit was filed, in arriving at the \$1,500. The amount of butter fat that I received each of the months of 1914, as set out in this bill of particulars, and the price at which I sold butter fat those months, is not correct for all the months. In June—this is for the Imperial Valley Creamery; I sold part of my stuff to a man that had the small creamery who produced butter for the local market; they went out of business, and I went to this man and asked him if he could give me a record of that; he told me he did not have any records, and he could not give it to me.

Q. Then, what months are correct, except June, as

(Testimony of W. W. Skinner.)

to the amount of butter fat which you sold from your herd, as nearly as you could determine it from the records of the creamery? A. Well—yes.

Q. And during the month of June, instead of receiving some 1,576.9, you received some additional—how much did you estimate?

A. Well, it amounted to \$600.15 sold during June; and the average price at that time which I set out here, was 26 cents,—so that \$600 worth of butter fat should be added [137] to this schedule I set out in the bill of particulars for the month of June. You multiply that at the price, and subtract \$600.15, and you will get what the other creamery has.

Q. And in all other respects, the items set out in your bill of particulars, all except the month of June, and the price at which you sold your butter fat during those months is correct?

A. Those people got a little in May; I sold a little more butter fat than is indicated by this bill of particulars during the months of May and June.

In January, 1914, I was milking practically three strings of cows—90 cows. In June, 1914, we were milking 100 cows. In October, November and December, 1914, I was milking the three strings of cows. Practically, I was milking the same number of cows all during the year. Cows give more milk at some seasons of the year than at others. In Imperial Valley, as a rule, the months of October, November and December are the best months of the year. As a rule, the milk falls off along in the winter; and by winter I mean January and February,—

(Testimony of W. W. Skinner.)

usually, February is as low a month as you will have. I disposed of two cows that I claim were injured in 1915, and disposed of 6 of them in 1916; I still have a few of them that I have never been able to get on the market. All these cows that I claim were permanently injured, I did not milk after Reed left in December; I have not milked them to date.

Q. How much did you pay for the milking machine to the Sharples Separator Company?

A. I think it was about \$460; I took advantage of a [138] discount they gave and paid it off, and it amounted to about \$460 that I paid the Sharples people; that does not include the installation of the machine. I paid to the Sharples Separator Company for the three unit milking machine the sum of \$461.42 as my check shows. I have set out in my bill of particulars that I paid \$175 for an engine; that was a gasoline engine; I still have that engine; I am using it in running my separator; and I have used it at all times to run my separator; I use it because I had it and I could not dispose of it; I never had one before I bought it to run this machine with. I do not consider that it is worth anything to me to run the separator with, because I have to pay my men the same to separate it by hand; I suppose it is of some value; it is in good shape and was in good shape when I ceased using the milking machine. I set out in my bill of particulars that I expended \$370 purchasing lumber to build stanchions for my cows; that was built for the purpose of in-

(Testimony of W. W. Skinner.)

stalling this machinery. I paid \$370 for lumber to build stanchions with; I am using those stanchions now; and I have continued to use them ever since I installed them.

Q. Isn't it customary among milking men to use stanchions whether they use milking machines or milk them by hand?

A. They are used by very few in Imperial Valley. By stanchions I mean a place for the cows to go in and stick their heads through so you can fasten them and they can't get away from you; not necessarily to hold them still while you are milking them; for keeping them from getting loose; they poke their head through there and you draw their head up fairly tight so they cannot move; it avoids [139] the necessity of tying the cows and prevents them running around the stable. I have not any check of the amount I paid the lumber company; I bought the lumber from the Imperial Valley Lumber Company; that lumber bill includes cement, lime and nails. I put the cement underneath; I cemented the floor where the cows stand, and that cement is still there. It is not customary in Imperial Valley for dairymen who desire to run a clean dairy to cement their floors—it is not a custom; most of them have just an ordinary dirt floor.

Q. Isn't a cement floor much more sanitary, and isn't a dairy better equipped that has a cement floor than a dirt floor, and you could run the milking machine better with a cement floor?

A. They told me to put a smooth floor under them.

(Testimony of W. W. Skinner.)

Q. They didn't advise you that was necessary for the operation of the machine, but it was advisable for sanitary reasons; is not that correct?

A. They didn't say it would make the milking machine go any better.

Q. Well, it wasn't necessary, was it, Mr. Skinner, to put in a cement floor in order to operate the machine?

A. Well, I will say it was, either a cement floor or a plank floor; and the reason why is you put those cows in those stanchions on a dirt floor, with more or less liquid and manure under there, which makes that dirt soft, and the cows were just stamping in the mud; that would be true if I tied the cows in the stable without a floor.

Q. You really, Mr. Skinner, needed a floor in your barn?

A. I did not have any barn at all; I had been operating [140] there since five years ago without a barn. As to whether my barn is more sanitary and a better barn for milking for dairy purposes now that it has a floor in it, I would not give a man \$10 to go and install one. All of the best dairies do not have a cement floor or some kind of a floor. The amount that I paid for the cement, and the amount that I paid for the lumber constitutes the bill; I cannot segregate the items; aside from cement, sand and lumber, there was an item of nails.

Q. In fact, that is the cost of fixing up your barn, including the cement floor and the stanchions, and

(Testimony of W. W. Skinner.)

cleaning up the surroundings to make them sanitary? A. Yes, sir.

Q. And those are the things that Mr. Reed and Mr. Hickson advised you should be done in order to make the dairy sanitary?

A. Well, I had to build the stanchions; they told me that I would have to build stanchions before they could install the machine. As to whether you milk several cows at the same time with that machine, it is owing to the units; you milk one to the unit; and you would have to have the cows fastened in a row. Most dairies in Imperial Valley do not fasten the cows in a row, whether they milk them by hand or a machine, for the simple reason in the spring, summer and fall it is so hot you get in there, the men will not work,—unless you have got an extraordinarily cool place they object to it; you can build what you call California shingles—build a shed and the cows walk under that, and most men prefer that to a barn of any kind, because it is cooler, and there are very few people that have [141] those stanchions.

Q. I show you a diagram of a Sharples milker and ask you if that is what is known as a unit, together with the milk pail and the teat cups?

A. From here, this pulsator, and to here, is considered a unit (indicating). I could not tell you whether the two pictures on the right-hand side thoroughly depict the method of operation of the teat cup on the teat of the cow, because this is all enclosed here, and the teat goes in there, and you

(Testimony of W. W. Skinner.)

cannot see it; it has a vacuum and a pressure; so far as the way it handles the teat, I do not know. This inside is made of rubber; the inside is rubber, and the outside is metal, and there is a metal band that goes right around the teats here—right at the top of the teat there is a large metal band which holds this metal in—that goes right up against the cow's udder. I had trouble with quite a number of my cows which were in a diseased condition, and had caked udders before I connected the fourth unit, not before I had ordered it; I could not tell you the number, but I should say 15 or 20 cows were affected before I put the fourth unit on. Throughout the entire year of 1914, at least one-half of my herd were affected—at least 50 from the use of the machine.

This is the machine, or a likeness of the machine which was installed; this is a little bit more polished, and looks a little brighter than mine did. These four things which I hold in my hand are the four teat cups placed upon the four teats of the cow, and the pail upon the floor is the milk pail, and the article which I now hold in my hand is the pulsator, and the whole thing constitutes one unit. I got three units of this kind from the Sharples Separator Company, [142] *Sharples Separator Company*, and then one later on. This unit is attached to overhead pipes carrying air from an air pump, and by hooking this unit on to the overhead pipes you thus connect it with the engine and with the air. When you desire to move this unit from one cow to another, you merely disconnect this pulsator from the over-

(Testimony of W. W. Skinner.)

head pipes and move it on to the next cow and there fasten it on again. I got to operating the machine—that is, I would go in, watch the boys and help; I would be in there—well, I have operated that, not regular. Mr. Reed instructed me and my son and the young man that worked for me named Allen, as to the manner in which the machine should be operated when he first installed it. In point of fact, after the machine was installed in February and until I discontinued the use of it, it was used by my son, this young man Allen, and Mr. Reed when he was there. My son is 21 years old and Allen was 22 or 23 years old. All that they knew about the machine was the instructions they received from the book of instructions that the company furnished and from Mr. Reed. This young man Allen and my son did most of the milking.

I understand the theory upon which this machine works; I did at the time; it has been so long that there might be some minor thing that might have slipped my memory. I understand that the teat cups which fastened upon the teats of the cow cause a squeezing of the teat—there is a squeezing pressure, and then there is a vacuum which sucks the milk out of the teat; the vacuum comes in direct contact with the teats. Outside of this chamber comes a rubber lining. The pressure squeezes the teat, but not like [143] the hand. The air comes in contact with the cow's teat. The pressure comes in between the inside metal lining and the metal casting of the teat cup; it massages the teat; it does not

(Testimony of W. W. Skinner.)

squeeze it. When the pressure is removed, then the vacuum is created, and that draws the milk out of the teat; and this pulsator which is fastened on to the air pipes from the air engine is so constructed that when the air is on it works back and forth in this manner (manipulating the machine); and the way I understood, when the pulsator tips one way the pendulum therein shuts off the pressure, and when it tips this way it lets the pressure on. The way I understood it, the air causes the pulsator to tip and the pendulum to slide from end to end thus causing alternate pressure and vacuum. There is no gauge on the air pump to regulate the amount of pressure; there is a gauge on the pressure to indicate the amount of pressure, and also one on the vacuum pipe; the gauge indicates the amount of vacuum and the amount of pressure going into the teat cups. There is also upon the pulsator certain levers or adjustments which regulate the amount of pressure which is admitted through the pulsator to the teat cup. The instructions say that to move this thing right here (indicating on the machine) would regulate the amount of pressure and the amount of vacuum; I do not know whether it does or not. I do not know that I ever tried it by putting my finger in the teat cup to see the amount of pressure that was caused on my finger where the cow's teat would be, and on the pulsator. As to the pressure at which I milk my cows, I used 17 and 7; the vacuum 17 and the pressure at 7; I did that all the time on every cow; I made no [144] change in the amount of

(Testimony of W. W. Skinner.)

vacuum and the amount of pressure when I was milking a large teated cow; I made the gages stand at 17 and 7 all the time.

Q. And used that pressure all the time, without regard to whether she was an easy milker or a hard milker?

A. Well, I am just going to tell you now, my instruction was when that ring around the top of that would cause the teat to inflame or be red, the thing to do would be to move this screw here, so as to relieve that. I moved that screw; there was very little results to it,—the only results that I got was injured cows.

I had ordered this fourth unit, and it came; I ordered it before I had any serious trouble. When Mr. Hickson appeared on the scene, I asked him if the milker was causing the trouble, and he said, "Oh, no." He assured me that it was not, but possibly the cows might have gotten hurt. Well, at the time I had not had enough experience with the cows being in that condition at that particular time to hardly know.

Q. Do you mean to tell the jury, Mr. Skinner, that when you move this lever over on the end from the point indicated as the "on" and the point indicated "off," it made no difference so far as you could determine in the amount of pressure?

A. It didn't affect the cows; it did not change them. My instructions were never to change the gauges—to make them stand at 17 and 7, under all conditions. The book of instructions made that

(Testimony of W. W. Skinner.)

very explicit, and every letter and every correspondence also—to make it stand at 17 and 7. I had a card that they made me hang up in the stanchions—to hold at 17 and 7. [145]

Q. That was in the air line, Mr. Skinner, you would have 7 pressure and 17 vacuum in the air line which run over the heads of the cows, isn't that true—the gages fastened on these air lines next to the pump? A. That is it.

Q. But their instructions to you were that you should use the lever on the pulsator to regulate the amount of pressure that was needed in the teat cups, were they not?

A. When the cows would become red around where the top of that teat cup pressed up here (indicating), to increase that pressure—increase that lever; they said that would increase the pressure on that particular cow and prevent that. I said that I made a change according to whether the cow was an easy milker or a hard one; I would move that lever on there when they would get to a cow that would make that ring,—why I would move that lever; they said that would increase the pressure.

Q. Well, I say did you increase the pressure on your cows or decrease it?

A. I will tell you what instructions they gave me; they said it would increase the pressure. I followed the instructions carefully, every word; I studied it like a school book; I received a book of instructions; but I have not the book that I received. I could not say that this book which you show me now is a

(Testimony of W. W. Skinner.)

copy of the book of instructions which I received with this machine; this is a book of instructions, but whether it is like the one that I received, I would have to look it over to be sure it was identically the same. I have not got the book which they gave me; it became destroyed; it was hanging in the [146] separator house; and after we discarded the machine, it just went to waste, went to nothing. I could not tell you what did become of it. I never expected to have any use of it any more. This looks like the book I had. It might be a later publication; there might be some difference in it; I am not sure about that; but my book was similar to that with the instructions.

I did not boil the teat cups—that is, I did not boil the portion of the unit which comes in contact with the cow—I did not boil them after each milking. I cleaned them, but not in boiling water. I sterilized the teat cups while I and my boys were running the machine. My instructions were to keep the teat cups in lime water. This part (indicating) went into the lime water—was to be kept in the lime water; and that is what I did. I never put them in any water containing any antiseptic other than lime water or in boiling water; I had no instructions to. After I found that my cows had caked bags, I did not use this machine upon them, only at Mr. Reed's directions; before Mr. Reed came there, I guess not.

Q. What would you do with the cow as soon as you noticed she had—

A. Milked her by hand. I never washed or

(Testimony of W. W. Skinner.)

cleaned the teat cups between one cow and another at any time; after I milked the cow I did not clean the teat cups before I put them on another cow. As to whether I milked any cows that had inflamed udders, the minute they showed any inflammation, I took the machine off. I did not have a veterinary at my place before I purchased the machine, to see my cows.

Q. Did you not state to Mr. Reed that you had some garget [147] among your cows, before you bought the machine? A. No, sir.

Q. You are certain that you did not?

A. Now, you wait, Mr. Parke; let me explain a little bit. The word "garget" is an expression that is used among the ordinary dairymen; it is a usual expression. I understand by garget, when a cow would come fresh, when it first comes fresh, if that cow is an extra heavy milker, very often her bag will be swelled and puffed out until the milk gets out; that is the way we term it. When a cow first comes fresh, her milk is not good, it is rather thick for awhile and has blood stains in it; it is not good; and sometimes a cow's bag will be swelled from that cause. That is what I understand by garget; that is the way we use it; when she comes fresh, if there is no mucous, when it first comes fresh; it was just an expression that the ordinary dairyman used. I had had cows that had garget, as I understand it, before I used the milking machine. I had had a few cows that were extra heavy milkers, that their quarters would be puffed, not swollen. There

(Testimony of W. W. Skinner.)

is a difference altogether. A man could, while milking from one of these milking machines, go in a herd and pick them out; he did not have to put his hand on it to tell.

Q. What did you tell Mr. Reed about trouble in your herd before you began using the milking machine?

A. I told Mr. Reed that I had a clean herd. He said I had a clean herd when he came to install the machine; he said, "Skinner, you have the cleanest herd I ever put a machine on."

Q. Didn't you tell him you had some trouble before you put this machine on? [148]

A. No.

Q. What were you going to explain to me?

A. Possibly, I might have used the expression to Mr. Reed that way.

Q. That you had had some garget?

A. Yes; I might have used that expression in that way.

I never had any injury to cows' teats: I never had any trouble like that; I never had any cows step on it before. I never had any step on it since. The condition of the cow's udder which developed after I used the machine was entirely different from the condition which developed when the cows first came in. As to the number of cows that had caked bags after I began to use the machine and showed evidence of pus in the bag, there were the 20 cows that were injured in July and June. Practically every cow that I claim sustained personal injury had a pus

(Testimony of W. W. Skinner.)

formation in the bag; that pus was not good stuff; it ruined the bags. Mr. Reed had Mr. Cram, a veterinarian, call in to examine my cows; he explained the matter with the cows in his own terms, in words that the doctors have. As to whether he told me that it was infectious mammitis, well, I don't—I would not say that he did, and I would not say that he did not. I do not think that he cautioned me about the danger of this disease spreading from one cow to another. I do not think he told me what should be done by way of preventive to spread the disease. I do not think he told me to sterilize my barn yard and clean it up. He gave me a prescription, and I went and had it filled; he gave us some medicine to give to the cows, and some that we injected into the teats. He did not tell me anything that I remember [149] about cleaning up the barnyard. If any veterinary visited my yard during the year 1914, for the purpose of examining the cows or taking extracts of milk, I did not know it. If a Dr. Taylor was ever on my ranch, I do not recall it since it was first brought up; and if ever Dr. Taylor was on my ranch, he was lying under cover; I do not remember it at all. If Dr. Taylor was there with Mr. Briggs, I do not know it.

My cows get their drinking water out of the drinking places; I have two kinds of drinking places. We had to run our water into settling basins out of the ditch. That is all the kind of water we have for domestic purposes, or any kind. This water goes into the settling basins and settles. I have a place like this, the settling basins, I have a plank wall

(Testimony of W. W. Skinner.)

right across here (indicating) back out so the cows can drink water just the same as if they were in the trough, and the pipe-line furnishes this water from that into this drinking place—out of the settling tank into this drinking place, so the cows can drink there. I also have some big tanks that I dug and set down into the ground and let the pipe run from the main tank into this tank, and keep the tank up so high—the water keeps just so high in these tanks set in the ground. All of the water in Imperial Valley comes from a common source, the Colorado River. I know where the Date Canal is.

Q. Is that water in the canal the same water that your cows drink?

A. All the water that comes in the Valley, comes from the Colorado River. Such water as one gets in the Barbara Worth Hotel, I think they claim they have the water filtered— [150] the water that is served on the table; but the regular pipes, the City has that water from the main canal coming from the Colorado river—that is where the City gets its supply of water.

Q. What was the condition of your barnyard as to drinking places for cows during 1913, up to the date you got this milking machine?

A. Well, I begin to make a little money in 1912 and 1913, and I was improving my ranch; when I went on the ranch there was not a settling basin on it; I fixed most of those places—the main settling tank and then pipes to the small troughs, if I recollect correctly in the winter and fall of 1913. Now, as

(Testimony of W. W. Skinner.)

to the immediate time that I fixed those things, I could not tell you. As I saw, when I went on the ranch there was not a settling basin for the cows to drink out of, and I had lots of work and I didn't have the time to do it, and as I got a little bit of money I began to improve it. Most of the people in the Imperial Valley permit their cows to wade out in the irrigating ditch. A great many of them still do that. When I first got the cows, I did the same.

Q. And up to how late a period did you?

A. Just as quick as I could get that work done.

Q. That was in the latter part of 1913, was it not, even after you got this milking machine?

A. I am not going to answer that in the affirmative, Mr. Parke, because I do not remember.

Q. It might have been about the time you bought this milking machine.

A. I am not going to answer that question in the affirmative, [151] because, as I told you, when I had the milking machine, I had those places.

Q. Now, before you fixed these drinking troughs, you had what is known as mud holes, that is places where the cows drink?

A. Most of the cows drank out of the ditch—out of the irrigating ditch. A great many of them walk right into the ditch, and when they walk into the ditch the cow's udders and teats would get into the water.

As to what kind of a barn, or the condition of the barn, in which I did milking, and kept the cows, during 1913 and 1914, I say that I did not have any barn

(Testimony of W. W. Skinner.)

at all in 1913. For shelter for the cows, I had a shed about 40 feet square, right in the middle of my corral; the cows walked in under it; and when it rained the cows walked around in the mud. I take my water from this same common source of water supply. As to when I first began to put my cows into a stable and put them in rows and fasten them, I have not got any stable yet.

Q. When did you begin to tie your cows up?

A. Why, I didn't have this—I didn't have this barn finished—that is, all of the concrete work finished, when they put in the machine. Prior to the date I put the machine in, the cows stood around, under this little shed on the earth, right on the ground, during milking time.

Q. Where was the mud hole from which your cows obtained their drinking water before you built the concrete troughs?

A. I did not build any concrete troughs. I had galvanized tanks out of 2 by 12 boards. Before I put in the tanks from which to drink, a great deal of the time we run the [152] water fresh into the ditches and they drank out of that until I got prepared to build some tanks, and as soon as we built some tanks—I got the idea from seeing other people build these wooden drinking places—I commenced to build those. They were not a sort of space dug out from clay in which I poured water and in which the cows waded; I did not have what is ordinarily called a pond to drink out of.

Q. And there was no place in which water stood

(Testimony of W. W. Skinner.)

around in your place in which the cows waded, prior to the date you put in these tanks?

A. Now, when I began to dig the tanks, I began to dig the water places.

The COURT.—Q. Before you built these tanks, was there a place where the cows stood in the standing water?

A. Prior to the time I dug these tanks?

Q. Yes.

A. As I said before, we let the water into the ditch.

Q. Well, was it standing water?

A. The ditch would not hold it for a day; we had to run water in there every day or two.

Q. It wasn't fresh water; you run the water in and fill the ditch up again after it had dried up?

A. We had to run it in every day or two until we got some tanks built.

As to where I got water from with which I washed my milking machine and teat cups, after I had installed the milking machine, why, we got it from various places. We sometimes got the water that we—we invariably got the water that we put the teat cups in and washed those in, [153] we would sometimes get it from the ditch right across the road, and some times get clear fresh water—that is the best water in the valley. It is not out of the main canal, it is a neighbor's canal across the road; this water runs from the Colorado River into the Imperial Canal. Oftentimes I had a cistern on my back porch, and then I have got a settling basin to get my water for washing the cans, and washing everything

(Testimony of W. W. Skinner.)

generally, right by the separator house, and some times get the water out of that. If the water would, from any cause, begin to get low in the pond, we discontinued to use it until we could get in fresh water.

Q. So that near the pump-house then you had a sort of pond in which you ran water and let it fill up and from that you obtained water to wash your milking utensils?

A. Not the teat cups; we got the best water we could for that. Now, to wash those utensils, I believe my—I had my tank made to set right up by my engine and the exhaust pipe coming through it, and the exhaust pipe from the engine went into it, and then during the length of time the engine would run in milking and separating, why, that water would boil in there, and we would use that water to wash up the buckets and things that we had to wash.

Q. But the water at the time you washed wouldn't be so hot you couldn't put your hands in it?

A. Poured it into the buckets and utensils. My cows never had access to that pond by the pump-house. Occasionally, the gate might have been left open, and the cows run through there, like cows would. I would not attempt to say that cows never went into the yard, but that was fenced and the [154] cows were not permitted to go into that place and drink. Prior to the date when I put in the cement floor, which was approximately the date I got the milking machine, the cows had nothing except the earth to stand upon while they were being milked; I did not fasten the cows at all and the ma-

(Testimony of W. W. Skinner.)

nure from the cows was left in the yard in which they stood around, for a reasonable length of time. I wouldn't allow the manure to accumulate to a great extent. We would not clean it out every day; sometimes not for a month. In the Imperial Valley, the sunshine through one day's time will dry nearly anything, and it will be just as dry as it can be in a day's time. I would not say that I cleaned up the yard once a month; I should say some times it would be a month in the busy time.

I said that this machine would draw the milk out from the cows.

Q. And there was nothing wrong with any part of the machinery; so leaving aside now the question of its effect upon the cows, there was no complaint about physical operation of the machine, was there?

A. The machine evidently didn't operate right or it would not have hurt the cows; it did not work all right mechanically or it would not have hurt the cows; aside from the injury which I claim resulted to my cows, I would not have any complaint about the milker; if no injury had followed, if it operated for the purpose for which I bought it, I would have no claim.

Q. If it had not, as you claim, injured your cows, you would have been satisfied with the operation of the machine? What was mechanically wrong?

[155]

A. Your expert was there, and he didn't know. Why should I know. I don't know if there was anything wrong with the pump.

(Testimony of W. W. Skinner.)

The COURT.—Mr. Skinner, you don't know whether there was anything wrong with the machine or not, except you claim it hurt your cows?

A. That is all I could say; it hurt my cows.

Mr. PARK. Q. And aside from that,—you had no complaint except the effect it had upon your cows?

A. If the machine had milked the cows I would have been only too glad, if it had answered its purpose.

As to the upward symptoms of the cows when they became diseased, well, when those cows would develop those hard quarters, why, they would get into very bad condition; the cow would stand with her eyes and head drawn; she wouldn't get about much; her general physical condition seemed to be affected. It affected the udder first, but after the infection had been there for a few days, it seemed to have a general depression effect on the cow. The udder was swollen, and the cows act very much like the udder was sore to the touch. I judged from the manipulation that the udder was sore to the touch. There was discoloration of the udder; it looked bruised—the tender part of the bag, the bruised part of the bag; the affected part of the bag would look bruised; the trouble seemed to be—well, it looked bruised all over. There had not been any milk from the cows whose bags were affected.

Q. It was only in those cows where it was a very aggravated case, where there was no milk that came?

A. Those cows that were ruined, when the cows—the first [156] time it would develop on them,

(Testimony of W. W. Skinner.)

before we could take the machine right off, and we begin to massage those cows and care for them, then milk came from that. When the milk came out, it did not look like ordinary milk; it looked spoiled, and after a while it was thick; and after a length of time, there was a cheese-like substance came out of the cow's teats in little lumps.

Q. You mean after the diseased condition had progressed to a certain extent, then there would be little cheesey substances come out, like clabber?

A. It would work out in the teat, and you can go to the cow then to care for it; it would be just as if it were an old sore, and try to run and try to get out. The pus came from the teats from some of the cows. There was an odor to the milk after the cows got into a certain state; there was nothing sweet about it.

Q. Was the first strippings sort of a watery like substance?

A. Why, when the—you could go to the teat and just squeeze and squeeze in that way, and you could get a little kind of a bloody, watery lot of stuff like that, and then you could come and you could pull like this and strip it. If anybody ever milked any cows they could get stuff out of that that they couldn't squeeze out this way, and then you could get that stuff out of it; you could strip some of it out. I never had any of the milk examined by any of the veterinaries. When Mr. Briggs was there he asked me if I had any objection to his taking some of that stuff out of one of those cows to have it tested.

(Testimony of W. W. Skinner.)

They wanted to straighten the thing out and find out if they could what was the [157] cause of the machine hurting the cows that way. They wanted to straighten it out, and he asked me if I had any objection, and he went to an old cow in October that had been ruined since July, and got some of the stuff out of there in a little bottle; what he did with it, I don't know. I never had any veterinary make any bacteriological analysis of any of the milk.

When a cow had a diseased or eaked udder, I administered treatment; I used Mr. Cram's treatment. When he was there, before Mr. Reed came there in the summer, I had absolute control of these things myself. Up to the time Mr. Reed came there in June, I had 30 cows I wouldn't dare milk with the machine. I had never ruined any cows permanently until Mr. Reed came in June. I used bag balm, and I used grease and massages and hot water, warm water, and bathed them and massaged them, and we got some bag balm, they call it. We worked that so far and got the milk to where they were not totally ruined. After a cow received one of those swollen quarters, she never did come back normal, even though you took her off and put her on hand milking, the milk would come, but she would never come back any more to what she was before that happened.

Q. Did you ever notify the Sharples Separator Company, or make any complaint direct to any of the officers of the Sharples Separator Company with

(Testimony of W. W. Skinner.)

regard to the damage which you claimed you were suffering?

A. After I discontinued the use of the machine, I did, to Mr. Frank; Mr. Edgar Bros. was right there and we were in close touch with one another; I would notify Mr. Edgar Bros., and he would pass the communications to the Sharples [158] people.

The COURT.—Your complaints then were made to Edgar Bros.—you made your complaints to Edgar Bros?

A. Yes, sir; I made my complaints to them. I made complaints to Reed or Briggs. When I would make my complaints to Edgar Bros., it would be when Reed or Briggs was not there, and they said they would notify the Company—well, they appeared on the scene. Briggs appeared on the scene afterwards. When Mr. Briggs came in the fall, I had not notified anybody then. Mr. Edgar and I had talked it over at different times and Mr. Edgar told me he had been in communication and touch with them, and in order to try to get it adjusted and get my money back, he had talked in general conversation at different times. When Mr. Briggs came on the scene, I never knew about his coming; I did not know how he came or when he was coming, until he got there.

I do not think it is true that, before the diseased condition, the machine, when it milked the cows, got practically the same amount of milk I got by hand milking. When one of those cows would become inflamed, she never would give the same milk any

(Testimony of W. W. Skinner.)

more. Before she got the swollen udders, she would not give as much milk with the machine as if I had milked it by hand. I have no way of estimating how much less milk she would give. As to whether I could swear positively that I did not get as much milk before the diseased condition appeared, well, I would say that—I would say this, that up to the time these troubles began to appear, why, the cows were on the increase. The cows were on the increase for this reason—it was the spring of the year; I installed it the first of February, [159] and February was always the shortest month, and the cows more than begin to—more than give—they begin to give more milk, and they begin to come in, and our milk would naturally increase under natural conditions.

Q. Now, if no diseased condition had appeared among your cows, you would have been satisfied with the milking machine, so far as extracting the milk from the cow was concerned?

A. (Mr. PARKE.) I did not have experience enough with the machine to answer your question definitely; I did not have enough experience with the machine. The only way you could determine that would be through a season. You milk cows through a season, and if they hold up as they would have through the hand milking, undoubtedly, I would have been satisfied; if not, chances are that I would not.

As to what I mean by the quantity of butter fat which I took from the cows, well, the butter fat does not indicate butter, or the pounds of butter; butter

(Testimony of W. W. Skinner.)

fat is the cream that comes out of the milk after it goes through the separator; it separates the skimmed milk, as we call it; it takes the fat out of the milk; that fat is what I sell to the creameries, and the skim milk is what I feed the pigs and hogs and calves,—we utilize the skimmed milk.

Redirect Examination.

I went to Mr. Edgar and told him that I wanted another milking unit, and he ordered me a milking unit. Briggs took the samples that I have referred to from a cow that was hurt in July; he got the samples in October; they [160] had not given any milk prior to the time he got the sample, not since July. The cows that I referred to when answering Mr. Parke were those that were injured with the milking machine; it was those cows that had been taken off the machine from some—from the small damage, and we had worked them out, and we milked them by hand. We had succeeded in reducing that swelling by milking by hand.

Q. Was there any evidence of any inflammation or swelling or hardness in those quarters at the time Reed came back, on those cows which you had been milking by hand.

A. Well, I couldn't say, Mr. Swing. Mr. Reed knew why we had taken those cows off, and we had succeeded in reducing them down to something like normal. At the time Mr. Reed installed my machine and instructed me in the operation of it, he did not suggest any changes to be made in the sanitary conditions which surrounded my dairy; when I first in-

(Testimony of W. W. Skinner.)

stalled the machine, I had concrete for the cows to stand on—I had concrete gutter, and I had a 2 by 12 runway between the gutters. The cows' heads stood out and their tails together, and we had a runway for the cows to come in, as we call it, and worked up and down with the milker. Those were made of 2 by 12 at first; the gutters were concrete and the sides were concrete. On one side of the stanchions the gutter, we had to slit it in after the cows had gone into the stanchions. We began to use the stanchions—we installed the machine before I got the barn really finished, and we did not get this gutter as good as it should be, and after using it for a while the cows began to break it, and Mr. Reed was there, and he said, "Mr. Skinner, if you will just take two by twelves, it [161] will fill the gutter, and let them run those; we can clean it out." He did not suggest any other changes in the conditions there. I operated the machine under the same conditions under which he operated it. He did not wash the teat cups in any different water from what I washed them—I mean water from any different source. I just simply followed out what he showed me.

Recross-examination.

When Mr. Reed went down in October, he only used two units at a time on the 30 that were set aside, and the other two units were not used; Mr. Reed may have used all four of them; I don't know which ones he did use.

Testimony of Aubrey Skinner, for Plaintiff.

Thereupon, said plaintiff called AUBREY SKINNER, as a witness in his behalf, and said Aubrey Skinner having been first duly sworn, testified as follows:

Direct Examination.

I am a son of the plaintiff, who has just left the witness-stand. I am 21 years of age. I live at El Centro, California; and I have been living with my father ever since I was born. I was familiar with the dairy herd that my father had there. After the milker was installed, it was operated by myself and the other hired man. I got my instructions from my, father. Sharples' man, Reed, instructed us; he was there instructing us about two weeks, and at the time he went away he said he thought we were all right. He came back afterwards, three times. I do not recall any suggestions or changes which he asked me to make in the way he found me milking when he came back those other times. I had a book of instructions, and I followed [162] those instructions. I operated this milker in the method that I have described for possibly a month before I observed any change in the conditions of the cows; then I noticed that the cows started to come in with hard quarters; and I took them off and milked them by hand, and the result was that the cows returned to normal, except that they did not give as much milk. From the time I started milking, one string of cows, or 30 cows were taken off the milker at one time or another. When Reed came back there on June 25, he

(Testimony of Aubrey Skinner.)

put them all back on the machine. I and the hired man assisted Mr. Reed in milking during June. I got my instructions from Reed. I put the milker back on all the cows; the string of cows that had been injured before and which I had been milking by hand, started coming in with hard quarters again, but worse this time; some of them had three quarters, and some of them all of them. Between June 25th and July 7th, we had 14 cows in the hospital as we called it, and then there were more that were not so bad and were left in the corral with the rest of them. The 14 that were in the hospital did not give any milk, and did not give any more that year. Reed left there a few days after the 4th of July; he said the Sharples Separator people called him back. The milker was not continued in operation after he left; it remained in disuse up to October 20th. In October it was finally started on a bunch picked by Mr. Briggs and Mr. Reed; there were no cows in that bunch that had been injured before; Briggs stayed there after the first milking, and I think he came back a time or two after that; Reed stayed until about Christmas, I think. I went away that fall; I think I left on the 5th [163] or 7th of December; up to the time I went away, the effect of putting the milker on this new string of cows that Reed picked was that there were seven or eight that had hard quarters—I would not be positive. I came back some time in February, 1915, and have been there since. Since I came back, the cows have been milked by hand, and are being milked by hand now. After

(Testimony of Aubrey Skinner.)

I stopped using the milker, and since I have been milking by hand, there has not been a single cow of swollen quarters appear in my herd. Prior to February, 1914, we had been milking this herd of cows by hand ever since we had them—two years, I think; and prior to the time the milker was put on, I had not seen a swollen quarter in the cows I had milked.

Cross-examination.

I did not operate the machine from the time it was installed continuously until Mr. Reed came down there in June—for the period of all of February, March, April, May and June and up to June 25th; when we got that bunch of cows with hard quarters, I started to milking them, and the other fellow used it.

After we began milking the cows with the milking machine, the cows began having swollen quarters for the first time in about a month. As soon as they developed swollen quarters, we took them off and milked them by hand; and when we did that, well, I would not say she got all right, but it looked like she was; she did not give as much milk as she did before the swelling was begun. I did not put the machine back on that same cow again. But it was later on in June when Mr. Reed came down. Up to the date [164] when Mr. Reed came down there, we had about a string, or about 30 cows with affected quarters. And among those were cows from which the flow of milk later entirely stopped. When I milked the cows, I drew from the teats of the cows a couple of squirts of milk before I put the teat cups on. I

(Testimony of Aubrey Skinner.)

did that in every case; I stripped the cows after they were milked; and it would be two or three minutes, I guess, after I took the teat cups off that I stripped the cows. I did not make any adjustments or attempt in any way to regulate the use of the machine, the pressure and the vacuum; we followed instructions; that was all we knew about it. By following instructions I mean we did what Reed told us, and I saw in the book there. I did not make any adjustments as to the amount of pressure and vacuum on one cow and on another cow, but milked them all with the same amount of pressure and the same amount of vacuum. As to the pulsator, I made changes when I changed from one cow to another—adjusted that little thing in the pulsator. When I was milking a hard-teated cow, I did not make any adjustment on the pulsator; it says when they get red, why, turn that little outfit off; and I would wait until the teat got red before I turned that off. We had to wait until it got red the first time to see whether it would do it or not.

Q. But you would not know until you took it off, of course, whether it was red; now, the next time you milked that cow, would you milk with less pressure?

A. More pressure, wasn't it?

Q. Well, which was it? [165]

A. More pressure; I would use more pressure. As to the vacuum, when I found that the milking machine was causing red teats, I let the vacuum stay as it was. I made that adjustment on the pulsator as I

(Testimony of Aubrey Skinner.)

changed from one cow to the other, but not between every cow.

Redirect Examination.

I know what this sign is (referring to enameled sign); it is instruction; it came with the milking outfit; this was kept hanging up in the barn where the cows were milked.

Testimony of Mrs. Ida Skinner, for Plaintiff.

The plaintiff thereupon called Mrs. IDA SKINNER as a witness in his behalf, and said Mrs. Ida Skinner having been first duly sworn, testified as follows:

Direct Examination.

My name is Ida Skinner; I am the wife of the plaintiff in this case; I have been living on the dairy during the time my husband has been living in Imperial Valley. I am familiar with the string of dairy cows owned by my husband; at that time, before we got the milker, I had milked most every cow in the corral. That milker was sold to my husband and installed in February, 1914. It was installed by Mr. Reed, who stayed at our home while he was installing it; he was there about two weeks. Besides simply installing the machine, he milked the cows and instructed our son and Harvey Allen to use the milker; and at the time he left he said he thought they were perfectly capable of running it. He was back there after that a number of times—three, I believe; and when he came back he said [166] they were operating the machine all right. I never heard of his making any suggestion of any change in the

(Testimony of Mrs. Ida Skinner.)

method in which they were operating it. After the milker was started I still kept in touch with the dairy cows, and noticed a change in the cows after the milker was put on them—about a month or six weeks after; I noticed the swollen quarters—hard quarters; as to the number of cows I saw with swollen quarters down to the time that Reed came back on June 25th, it must have been a string—what we call a string. When cows developed swollen quarters, we took them off the machine and milked them by hand; that had the effect that they always seemed to get better. When Reed came that day we had a string milking by hand which had been injured. As to the occasion of Reed coming back there on June 25th, Sharples people sent him down; when he got there he put the machine back on the cows. No one there attempted to exercise supervision over him; he took charge; he put the machine on all the cows, and ran it about two weeks. I observed the effect of the milker to be the same—hard and swollen quarters; the cows were ruined; there was, I think, 17, if I remember, out of the corral, and then more that were injured in the corral. Mr. Reed had a veterinary come out at that time, and they used a treatment; and then Mr. Skinner had a man to attend to the cows, and especially to those cows—not to do anything else. At this time, some of the 17 did not give any milk at all; they were too bad; but there were some that gave a substance,—I don't know whether you would call it milk or not, you would not take the milk from them to use. If one quarter were affected, it would not affect the

(Testimony of Mrs. Ida Skinner.)

other quarters; [167] just that quarter alone would be affected; each quarter is independent of the other. As to the 17 cows that I have referred to, in some of them all of the quarters were injured, and some less, but I do not remember just how many, how many of each quarter of each cow. From those 17 cows, we were not using the milk to take to the creameries.

The COURT.—Wasn't using the milk out of any one quarter or not?

I don't think so, of the 17. After Reed left in July, the machine was not operated by my husband or my son; none of my folks started it up again after that; it was started by Mr. Reed. From July to October, that machine was not worked on our place; during that time, none of the cows got diseased; there were no new cases of swollen quarters during that time. In October Mr. Briggs came down. Mr. Skinner did not want to start the machine, and I was very bitterly opposed to it, but he finally started it under that written paper.

Mr. SWING.—Q. Was it started before or after that written paper was signed by Mr. Briggs?

Mr. PARKE.—We object to that. There is no evidence of a written contract of any kind.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 16.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—After. Briggs was there for

(Testimony of Mrs. Ida Skinner.)

one milking after Reed came, and then a time or two after. Briggs helped Reed to sterilize everything and get it milking. [168] Reed operated it from October until just after Christmas; and while the machine was being operated, something like 7 or 8 cows, I think, of swollen quarters developed; during that time no new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20, they selected a string of good cows; I think they were mostly young cows that had not been used on the milking machine before. Some of these cows had had their first calf, I do not know how many. As to what was the occasion of Reed's quitting on December 20th, why, when he came into the kitchen—he always came into the kitchen where I was; when he came in, he said he was not going to put the milker on another cow, and I wanted to know why, and the words that he used was that he had ruined the last cow for us with the milking machine that he was going to.

No cross-examination.

Testimony of W. W. Skinner, Recalled in His Own Behalf.

Thereupon the said plaintiff was recalled as a witness in his own behalf, for further redirect examination, and testified as follows:

Mr. SWING.—Q. At the time, Mr. Skinner, you purchased the three units from Mr. Hickson representing the Sharples Separator Company what if anything was said by him as to the manner or way in

(Testimony of W. W. Skinner.)

which you could purchase another unit if you so desired?

Mr. PARKE.—We object to that as incompetent, irrelevant, immaterial and already testified to.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 17. [169]

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Why, Mr. Hickson was there with Mr. Edgar's man, and he told me any time I wanted another unit I could either order it through them or notify Mr. Edgar, and they would get the unit for me.

Recross-examination.

I went to Mr. Edgar and he ordered the fourth unit for me; there was nothing said about paying for the unit; I just told Mr. Edgar to order the fourth unit for me, and he did; this fourth unit was charged to me by Edgar Bros. from whom I have received statements for it. I did not communicate with any officer or employee of the Sharples Separator Company when I bought the fourth unit,—I communicated with no one except Edgar Bros.; I never received any bill from Sharples Separator Company for the fourth unit.

Mr. SWING.—The plaintiff rests.

Thereupon, the defendant, Edgar Bros. Company, demurred to the evidence and moved for a nonsuit, which demurrer was by the Court sustained and nonsuit granted.

Thereupon, the defendant Sharples Separator Company, a corporation, made the following motion:

We desire to move for a nonsuit on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was from an indiscriminate use of the four units. And it further appearing from the evidence that one unit was purchased from Edgar Bros. and three from the Sharples Separator [170] Co., and no evidence having been introduced and no basis upon which the jury or the court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharples Separator Company, or the damage which resulted from the unit purchased from the plaintiff by Edgar Bros. Co. Upon the further ground that the testimony, as offered by the plaintiff, is not sufficient to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows.

The COURT.—I will overrule your motion. Exception granted.

EXCEPTION NUMBER 18.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

Thereupon, said defendant Sharples Separator Company, a corporation, made its opening statement to the jury and proceeded to introduce evidence upon its behalf as hereinafter follows:

Deposition of Dr. Walter J. Taylor, for Defendant.

The deposition of Dr. WALTER J. TAYLOR, a witness for and in behalf of the defendant Sharples Separator Company, a corporation, was then introduced and read in evidence. Said deposition is as follows:

Direct Examination.

My name is Walter J. Taylor. I am a legal resident of the State of California, and at present am located at Cristobal, Canal Zone. I am investigating an outbreak of anthrax among beef cattle of the supply department of the Panama Canal. I am a veterinarian by profession. I have [171] been engaged in the profession of veterinarian for ten years. I was educated at the New York State Veterinary College, Ithaca, New York, taking a three-year course. I taught in the Veterinary College two years after graduation; then one year as first assistant State Veterinarian for the State of New York; was professor of veterinary science at the Montana State Agricultural College; was assistant professor of veterinary science in the State Experiment Station, Berkeley, California, being located at a branch experiment station at El Centro, Imperial County, from September 1913, to September, 1915; and veterinarian for the Miller & Lux Company, Inc., at San Francisco and Los Banos, California, from September 1, 1915, to August 1st, 1916. I am at present investigating an outbreak of anthrax among beef cattle of the Supply Department of the Panama Canal. I was connected with the University of California for

(Deposition of Dr. Walter J. Taylor.)

two years as assistant professor of veterinary science, engaged in extension and research work, divided between Berkeley, California, and the branch experiment station at El Centro, California. While I was so connected with the University of California, I was connected with the branch experiment station as veterinarian from September 1, 1913, to September 1st, 1915, the work consisting of extension work, and the investigation of animal diseases, particularly those occurring in Imperial County. This work was conducted at the branch experiment station of the University, located at El Centro. I once met Mr. W. W. Skinner who lives near El Centro in Imperial Valley, California, at his ranch, near El Centro—the date I do not recall. I met him at his ranch for about half an hour and have never [172] seen him since. I lived in Imperial Valley, California, from September 1, 1913, to September 1, 1915, being engaged as veterinarian to the branch experiment station of the University of California, located in the valley. I have visited the dairy farm ranch of W. W. Skinner near El Centro, California; I do not recall the exact date; I visited the farm at the request of Mr. Briggs, a representative of the Sharples Milking Machine Company; the purpose of my visit was to examine some cows affected with udder trouble. The cows that I examined belonged to W. W. Skinner; I examined four cows; the udders of each one of these four cows were examined by manual manipulation in order to determine the presence of congestion or other pathological condition that

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might be present. I took milk from the bags of Skinner's cows. Each one of these four cows was affected with mammitis in one quarter of the udder and a sample of milk was taken from each cow, from the affected quarter. I took about two ounces of milk from each one of the cows, the milk being drawn into sterilized wide-mouthed bottle of the above-mentioned capacity. It was drawn by hand milking. These samples of milk were taken to my laboratory at the branch experiment station, and smears made from each one, stained, and examined under the microscope. Cultures on Agar plates were also made from each sample, and after 24 hours incubation at 37 degrees Centigrade, sub-cultures were made upon slant Agar medium, in test tubes from numerous bacterial colonies appearing upon the Agar plates. The Agar plates showed bacterial colonies of several forms of bacteria, including motile and non-motile rod-shaped organisms; also numerous colonies of coccoid organisms, presenting a lemon-yellow color in [173] growth. The latter form of organism was present in large numbers. Several of the colonies referred to were marked and by the use of the sterilized platinum needle they were transferred on Agar slant mediums in test tubes by the streak method of inoculation. The result showed that the yellow micrococcus was the predominating form of organism.

At the time I took the samples of milk from Skinner's cows, Mr. Skinner was present, Mr. Briggs, and several of Mr. Skinner's milkers, names

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unknown to me. There was one other party present, whose name I do not recall, who went out with us in an automobile. I took samples of milk from four cows. While I was at the Skinner ranch, I did not make it a point to observe the sanitary conditions about the Skinner ranch, but noted that they were about on a par with the majority of dairies in the Imperial Valley; the only point that I remember distinctly was that the barnyard was very muddy; and I noticed that this muddy condition of the premises caused more or less mudying of the bodies and legs of the cattle. The cows at the Skinner ranch were not groomed, the animals being milked showed the same condition already noted, that is to say, the bodies and legs had more or less mud on them. I did not observe anything further than the conditions just referred to. I did not make a definite note in regard to the condition of the udders and teats other than those examined from which the milk was drawn; the four cows that I examined showed loose dirt upon the udders, and each cow had one diseased quarter. As to the condition of the Skinner barn and barnyard, I made no observation other than that already mentioned, that is, that the barnyard was muddy and [174] that there was more or less mud on the bodies and legs of the cows. I made no observation in regard to the drinking water of the cows, nor as to the sanitary or unsanitary condition of the water supply; but I did observe the water supply used for washing utensils. I made no special observation in regard to the drinking water. I did

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not see Skinner wash any of the utensils used in connection with the milking machine on his farm. After observing the water used in washing the milking utensils, I asked Mr. Skinner if this water was boiled before being used, and I do not fully recall his answer, but my impression is that he said that it was simply heated and not brought to the boiling point. In order to properly sterilize articles washed therein, the water should be brought to the boiling point, or to 212 degrees Fahrenheit. I did not take any samples of water from the Skinner farm. I had no conversation with Mr. Skinner as to the place from which the cows obtained their drinking water. Mr. Skinner pointed out to me the settling basin from which the water was obtained to wash the parts of the machine. He simply said to me, "The water is settled in this basin and used for washing the milking utensils. "I did not take any samples of the water. All the water used in the Imperial Valley west of the Alamo River, comes from the Colorado River; this water supply is very heavily laden with silt, and has to be settled before being used. I took no samples of water from the Skinner ranch, and therefore did not make any analysis. I never took samples of any other water in Imperial Valley, or made any chemical analysis thereof, but I did make a bacteriological analysis of the general water supply of [175] Imperial Valley. I made no chemical analysis, but made bacteriological analyses of water obtained from the following sources: The Date Canal, tap water from the El Centro

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Hotel, and filtered water from the Dunniway Drug Store. I made no chemical analysis, therefore, I had no chemical results. The bacteriological analyses showed large numbers of organisms of the yellow micrococcus variety, the morphology of which, as well as their cultural characters, were identical with those obtained from the udders of the Skinner cattle. I do not recall the number of these organisms, per cubic centimeter of water, but will state that they were more numerous in the water from the El Centro Hotel tap than from the Date Canal water and the filtered water from the Dunniway Drug Store. The micrococcus found in both the milk taken from the Skinner cows and the water taken from the sources already mentioned, were identical in morphology, cultural and biochemical properties. The rod-shaped motile and nonmotile organisms mentioned as being found in the milk were not encountered in the water.

I have treated cases of mammitis in cows. My experience shows that if the trouble be of an infectious nature the treatment should be administered internally through the teat of the cow by antiseptic washes, that is, the udder should be flushed out, so to speak, with an antiseptic solution, the outside of the teats also treated with an antiseptic solution; but if the mammitis is not infectious, it may be treated by the internal administration of medicines per orum; or locally upon the external surface of the udder. There is more than one kind of mammitis. There are two forms, known as infectious and

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sporadic. The infectious [176] mammitis is so called from the internal invasion of the mammary gland by an invading organism. Sporadic mammitis may be caused by congestion due to a traumatism or a general fevered condition of the animal, such as sometimes arises shortly after calving, and produces what is commonly called "caked udder" and "caked bag." These two forms of mammitis present practically the same outward symptoms, but the infectious mammitis is characterized by the presence in the udder of some kind of an invading organism, and it is spread through the herd from one cow to the other. Sporadic mammitis generally affects one animal or possibly two in a large herd, is not characterized by the presence of invading organisms in the affected udder and does not spread from animal to animal. I made no chemical analysis of the milk taken from Skinner's cows, but the bacteriological examination showed that they were affected with mammitis. The udders of the cows may be infected with mammitis. I consider that the bacteriological examination which I made of the milk drawn from the four cows owned by Mr. Skinner showed that they were suffering from infectious mammitis, due to the presence of large numbers of micrococcus already referred to. I examined the udders of each of the four cows from which the milk was drawn. As already stated, one quarter of the udder of these four cows was affected with mammitis, the affected quarter being somewhat swollen, congested, hot and tender to the touch, and one quarter especially noted upon one

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of the animals contained a necrotic foetus, a portion of which had sloughed out, producing a pit, from which pus was discharging. At the first attempt to draw milk from each one of these affected quarters, only a watery [177] substance resembling whey was obtained, but upon manipulation of the udder a thick, semi-solid cheesy mass was obtained. As before stated, the first drawing of the milk was of a watery nature resembling whey. The milk drawn from the affected quarter had a sweetish, sickening odor. Not knowing just how long this condition had persisted, it is not possible for me to state what the cause of the condition was. From an examination of the milk drawn, my opinion is that the condition of the udders at the time of my examination was largely due to the presence of the invading organisms already referred to. In my opinion, the diseased condition of the udders of these cows had not been properly treated, due to the fact of the sloughing in the one case already mentioned. If suitable antiseptic washes had been administered at the onset of this trouble, I do not think the condition that I saw would have been present at the time I made the examination. I do not think that the condition which I observed in the udders of these cows could have been produced by injury, unless the injured member was badly neglected and no treatment given. In my opinion, infectious mammitis can be transferred to or communicated from one cow to the other by hand milking. The proper precautions to take in order to prevent the spreading of infectious

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mammitis from one cow to the other when they are being milked, either by hand or by machine, would be as follows: Isolate the affected cows and milk them last after all the healthy cows had been milked either by hand or by machine. The teats and udders of the affected cows should be washed with an antiseptic solution, the hands of the milker or the cups of the milking machine sterilized after milking the healthy cows and before milking the diseased [178] cows, as well as between the milking of each one of the diseased cows. I understand that the Sharples Separator Company's milking machine milks the cows by a process known as the "vacuum process"; other than that I do not know the modus operandi. The Sharples Separator Company's milking machine could not, of or in itself, generate or cause infections mammitis, unless proper care as to washing and sterilization was not taken with the teat cup. It is not possible to mechanically produce infections mammitis. As to whether I had any conversation with W. W. Skinner in relation to his treatment of the diseased condition of his cow's teats and udders, I do not recall specifically, but it is my impression that Mr. Briggs, in my presence, asked Mr. Skinner if he was treating these affected cows. He replied that he was not.

Traumatic mammitis is a mammitis produced by a traumatism, otherwise known as an outside injury. The proper method of treating traumatic mammitis is by local application on the outside of the affected udder, using agents to reduce the congested condi-

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tion. The proper manner of treating infections mammitis is by irrigating the inside of the udder with a standard disinfecting solution of some sort, with the object in view of destroying the invading organisms. Sporadic mammitis should be treated according to the condition which gives rise to it, as more fully explained hereinbefore. One cannot tell from an external observation whether the diseased condition was sporadic or infections mammitis; one could determine whether the diseased condition was sporadic or infections mammitis from the history of the conditions, and a bacteriological examination [179] of the contents of the affected udder. I saw nothing that would indicate that the teats and udders of Skinner's cows were being treated, and in answer to a question propounded by Mr. Briggs, Skinner answered that no treatment was being given. In the case of a herd of cattle where some of them were infected in the way Skinner's cows were infected, I would advise that the use of the milking machine be discontinued, at least until a differential diagnosis, had been made to ascertain whether the mammitis was infectious or sporadic. If a milking machine were used upon a herd of cattle where some of them were infected in the way Skinner's cows were infected, this precaution should be taken, that the affected cows should be isolated and milked last, with adequate sterilization of the teat cups between the milking of each cow, and before being used upon healthy cows after using upon diseased cows. From my examination of the milk,

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teats and udders of Skinner's cows, I do not think that the diseased condition which I found was caused by the use of the milking machine: I do not think so from the fact that the examination of the milk showed an infections mammitis, as heretofore stated that the milking machine could not cause the diseased condition which I observed at the time of my examination.

Cross-examination.

I examined four cows on the Skinner place, paying particular attention to the diseased condition of the udders of these cows, noting just what the diseased condition was. I was at the Skinner ranch about 30 minutes; I took samples of milk from four cows, and each sample was [180] kept separately. I do not consider that the Skinner Dairy was on the whole above average of Imperial Valley Dairies for general sanitary conditions. I do not recall the date on which the visit was made to the Skinner ranch, and so stated to Mr. Smith at the Claus Spreckels Building. I do not know how long after Skinner had abandoned the Sharples milker that my visit was made; he was not using the milking machine at the time of my visit. I made the statement to Mr. Smith, attorney for the Sharples Separator Company, at the Claus Spreckels Building, San Francisco, that I would not want to say that the udders and teats of the cows belonging to W. W. Skinner were dirty, because I do not remember very distinctly in regard to that; and as referred to in direct questions, I do not recall that they were what might

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be called "dirty"; they had more or less mud upon them. As I recall, it was after a rain that I visited the Skinner place, but the rain had not been sufficient to produce as much mud as was in the barnyard. I made no particular note of the condition of the barn, but as far as the barnyard is concerned, my observations were such as recorded in direct examination. I do not recall positively of observing the sanitary condition of the barn. I did state to Mr. Smith that I did not see any utensils washed in water from the cistern, which is a fact. I cannot say that Mr. Skinner had abandoned the use of the Sharples mechanical milker at the time of my visit to the Skinner ranch, but he was not using it at the time of my visit. It is a fact that I did not take samples of water from the Skinner place; the water that was examined by me was gathered by another person, but the places where the samples [181] were taken were mentioned in my direct examination. This analysis of water was made by me about a week or ten days after the visit to the Skinner place—I do not recall positively. I made the statement after examining the milk from Skinner's cows that in my opinion they were not suffering from infections mammitis; at that time it was my understanding that infections mammitis was caused only by streptococcus; later, I was informed by the dairy bacteriologist that infections mammitis could be caused by micrococci or other pus-forming organisms. I made practically the same statement to Mr. Smith. If the presence of a pus-forming organism in the udder of

(Deposition of Dr. Walter J. Taylor.)

an infected cow determines whether the mammitis present is infectious or not, and I think it does, these cows were suffering from infectious mammitis. The presence of any pus-forming organism, to which class these organisms, micrococcus or micrococcus citrus belong, would be considered as an infection, and would determine whether the mammitis were infectious or not. In my opinion, the findings in this particular case would indicate the presence of infectious mammitis. The micrococcus or micrococcus citrus, are found in small numbers where there is no infectious mammitis. I did not find any streptococcus on my examination of the milk taken from Skinner's cows. It is a fact that after the teats and udders of a cow have been injured, they then offer a more fruitful field for the invasion of diseased germs. In all healthy cows there are present in the udder various forms of organisms known as the bacterial flora. Ordinarily, these organisms produce no harm. In some instances such organisms will set up more or less inflammatory [182] condition following a traumatism. Such condition would ordinarily be overcome by a healthly cow and not by a diseased cow. If the Sharples Separator Milking Machine caused irritation and inflammation in the udders of these cows, they would be more susceptible to the invasion of organisms producing infectious mammitis. I did make the statement to Mr. Smith that I could not make a statement as to what the cause was, that I did not know what the cause was, but it was my impression that Mr. Smith's question

(Deposition of Dr. Walter J. Taylor.)

at that time was as to the original cause, that is, whether in my opinion the Sharples Milking Machine caused this condition or not. I told him it was my opinion that the condition started from an external injury, with a subsequent invasion of bacteria. At the time I visited the Skinner place, the injured cows were separated, standing by themselves in the barnyard, while the remainder of the cows were one string in stanchions and the other string in another yard. They were not isolated under fence from the other cattle or kept from the rest of the herd under separate enclosures. I do not know whether Mr. Skinner knew who I was or what my mission was at the time of the visit or not. The only conversation I recall having with Mr. Skinner was in regard to the settling basins for the water. I do not know that he knew who I was or what the purpose of my visit was. I was introduced to Mr. Skinner by Mr. Briggs as Dr. Taylor of the Experiment Station. Mr. Skinner did not ask, and I offered no suggestion as to the purpose of my visit.

Testimony of Dr. George H. Hart, for Defendant.

Thereupon, Dr. GEORGE H. HART was called as a [183] witness on behalf of the defendant, Sharples Separator Company, a corporation; and said Dr. George H. Hart having first been duly sworn, testified as follows:

Direct Examination.

My name is Dr. George H. Hart; I am a veterinarian; I am city veterinarian for the city of Los Angeles at the present time, and have been such since

(Testimony of Dr. George H. Hart.)

November 10, 1910—six years.

The COURT.—Any question about his qualifications, Mr. Swing?

Mr. SWING.—No.

The WITNESS.—(Continuing.) I am acquainted with the various diseases of cattle, particularly diseases of the udder. Mammitis is the general term covering all forms of inflammation of the udder; it is generally considered an inflammation of the udder. There may be different kinds of mammitis; they may be divided into garget, or caked udder, mammitis or sporadic mammitis, and infectious mammitis. Traumatic mammitis would be classed as sporadic mammitis. To distinguish between these two direct troubles requires a history of the case, sporadic, traumatic or ordinary mammitis usually affecting one animal or two animals, while infectious mammitis usually affects a number of animals. In order to further make the distinction between the two, you make a bacteriological examination and try to find the organisms that are causing this disease, there being a number of organisms which are known to be associated with infectious mammitis in cattle. The organisms which are conducive to infectious mammitis are the streptococcus [184] pyogenes, staphylococcus pyogenes aureus and staphylococcus pyogenes citrus; they are the micrococci which are the cause. These are also paratyphoid of the bacilli type, being long rod-shaped organisms. The micrococo*i* is the general term of all round bacteria, bacteria that are circular

(Testimony of Dr. George H. Hart.)

in shape when seen under the microscope. Should they happen to be connected and chained, end to end, they are called streptococci. Where there be irregular cultures, with no grading in shape, they are simply called staphylococci. The ordinary causes of mammitis are very general. They are classed as changes in weather, the lying with the udder against a cold surface, the lying with the udder in the damp ground, or digestive disturbances, overfeeding and not complete milking of the cows are among the general causes of mammitis. Garget, or ordinary mammitis, can result from hand-milking. In hand-milking, if the cattle had been milked during a short period by a number of different men, and particularly if they were men who were not interested in their work, and do not thoroughly milk out the cows, the *the* cows are being fed heavily and not thoroughly milked, the simple fact that the udder is not being entirely stripped of milk, may in this case set up forms of mammitis. If the milker is rough in handling the cattle, he can set up a mammitis. To settle the diagnosis of infectious mammitis requires the presence of organism in the udder; no milking machine, nor any mechanical process, nor hand-milking, can cause or create this organism. It is not possible to mechanically produce infectious mammitis—not without the presence of the bacteria: bacteria may come from the hand of the milker, or [185] from the teat cup of the milking machine, or from a pond in which the cows are allowed to walk through, or may be in the corral in which they

(Testimony of Dr. George H. Hart.)

are allowed to lie down,—the same as any germ of any disease might get into the system.

Q. If a number of Mr. Skinner's cows that had hardened udders, inflamed udders, that were sore to the touch, and the quarters of the udder became discolored, and the milk coming therefrom was watery, and cheese-like substances came out when the teats were pressed, and the milk had a very strong or different odor from ordinary milk, and if samples of milk taken from the cows with the bags so affected was submitted to a bacteriological test, and the milk being taken in sterilized bottles, and smears made and the smears stained and examined under a microscope, and cultures made therefrom, and the cultures were developed through incubation, and thereafter the bacterial cultures were transferred by the use of the sterilized Agar mediums in test tubes, what disease would you say was present in the udders of the cattle from which the samples of milk were taken?

A. The fact that there is a yellow micrococcus present,—the bacteriological book does not seem to have named the micro,—but the fact that it is yellow proves it is staphylococcus pyogenes aureus, or the staphylococcus pyogenes citreus, or the streptococcus pyogenes. If he meant a golden yellow, he means the aureus staphylococcus. If he meant yellow he means citreus coccus, and they are the only two organisms of a yellow color in milk or Agar slant medium, therefore, these organisms are associated—these organisms are known to be associated with in-

(Testimony of Dr. George H. Hart.)

fectious mammitis [186] in cattle, and with the history and number of animals being affected, some of them as severely as these animals are described, the conclusion would be that the animals are affected with infectious mammitis.

Q. And if the effect of the disease was to cause the udders of some of the cows—of practically all the cows to discharge pus and some of the udders to break open and slough out and become diseased, would that be further evidence of an infectious mammitis?

A. Yes, sir; that would be further evidence. The infectious mammitis is a severe type. In ordinary garget, or mammitis, resulting from an injury, without the invasion of infectious bacteria, such result would not follow, unless the bacteria also invaded.

Q. And if the cows of Mr. Skinner merely had what is known as traumatic mammitis, or ordinary garget, would you find such organisms when you made the bacteriological examination?

A. The presence of these organisms may occur under varying conditions. The presence of this staphylococcus is rare. You take this organism, it is found under varying conditions, but is found in association, a pathological condition as existing here, you would expect that was the cause of the organisms. On the other hand, if the ordinary mammitis in such organism is found, and it is not spreading, you would not necessarily conclude that that organism was associated with that ordinary mammitis. If the plaintiff used upon his ranch for irrigating

(Testimony of Dr. George H. Hart.)

purposes, and for the purposes of furnishing drinking water to his cows, a water with which he washed the utensils used with the milking machine, or the milkers used in washing their hands, [187] and it was found from a bacteriological test of this water that there was present yellow organisms or staphylococci, the cows might become infected with this water, the opportunity for infection would be there. The infection in these cases occurs through the teat canal, through the duct that goes up through the center of the teat. Now, this infection could occur, either by the animals walking through this water, as I have stated, or by the teat cups being washed in this water and not sterilized, and then being placed back on the cow, or by the hands of the milker that was washed in this water, and after even those hands were dried, they would still contain the organism if it were present in large numbers in this water, and in that way it would be possible to get on to the end of the teat and pass up into the teat duct to the inside of the udder. As the probability of a cow becoming infected with infectious mammitis, if the water in which she waded, or the mud around the farm contained water infected with staphylococci, if the cow was in the mud, the probability would be greater than in the water. It seems that in corrals, the experience that we have found around the City of Los Angeles, has been that where cows are in muddy corrals, so that they have to lie down under wet conditions, and mud sticking around the teats, that there is considerable or some greater probability

(Testimony of Dr. George H. Hart.)

of infectious mammitis than if they walked through streams of water.

Q. And if the cows were permitted to stand in a yard uncovered, and the manure and droppings from the cow were permitted to *remain the yard* for a period of a month before [188] being cleaned out, and the cows were permitted to lie down on the ground covered with these droppings, what would you say as to the probability of their becoming infected?

A. Well, with me the presence of the droppings in the canal would not necessarily lead to the probability of infection. If there was mud and overflowing water in addition, so that when they laid down they were in mud, and they were constantly in mud, so the teats would be in the water and in the mud, the probability would be greater. As to the precautions which are usually taken in making a place for cattle to stand to prevent the spread of infection, it is important to separate the infected animals from the noninfected and to provide dry, clean quarters for the noninfected ones to lie down, on the assumption that the mud is infected, and that it is necessary to give the cattle a dry, clean place to lie down. For the standing of the cattle, they usually provide a cement or wooden floor; it is required around this section of the country to have a wooden or a cement floor—required by the city ordinance, in order to ship milk in Los Angeles, to have a cement floor—dairies not having cement or wooden floors upon which the cattle may stand, cannot supply milk for

(Testimony of Dr. George H. Hart.)

consumption in Los Angeles City. Stanchions are ordinarily used in dairies; stanchions are simply a tying place in front of this floor to hold them while the milking is being done; there is a city ordinance requiring such stanchions; and the purpose of the ordinance is to secure a cleaner milk supply, to prevent the cattle from moving around in a manure-laden corral while milking is being done. I have observed a great many dairies throughout this territory supplying milk to [189] Los Angeles City; stanchions are usually built, whether they are using a milking machine or not; and either cement or wooden floors. I should not consider a dairy farm properly equipped unless it had a cement or wooden floor upon which the cattle could stand, and I would consider that stanchions are a necessary and beneficial thing to have on a dairy.

Q. State whether or not a milking machine utensil, or the hands of a milker, can be properly cleansed by washing in ordinary water not boiled?

A. If the water has been boiled, the utensils would receive no bacteria from the water, but the water would immediately become infected with bacteria the minute the utensils were put in.

The COURT.—How is that?

A. I say, if the water had been boiled—either, if the water had been boiled and cooled down again, the water would be sterile, but as soon as the milking utensils were put in the water would immediately become infected with bacteria.

Q. Would it sterilize the utensils?

(Testimony of Dr. George H. Hart.)

A. Not if the water had been boiled and then cooled down. Boiling these teat cups having rubber in them would not dissolve the rubber: it is hard on the rubber; they usually put them in lime water. It is practical to boil them, but the life of the rubber is not as long if boiled every day than if not. The practical way to sterilize them is to dip them in boiling water and take them out immediately—they are required to be in there a certain length of time. If you sterilize a teat cup with the rubber, such as in the Sharples Mechanical Milker teat cup, it would not destroy [190] the rubber. If one washed the utensils in water in which they would place their hands that is no hotter than one could place their hands in without injury, that would not sterilize at all.

If a cow became infected with ordinary garget, or non-infectious mammitis ordinary local treatment should be administered; the excessive feeding should be stopped; the cow should be given—see that her bowels are moving freely, and local treatment such as massage or hot fomentations, or oleaginous preparations rubbed over the surface of the udder. The chances are good of affecting a cure if it is a non-infectious mammitis. Whether ordinary traumatic mammitis ordinarily results in the *soughing* off of the quarter, or abscesses forming, depends upon the extent of the injury; if the injury is a very severe injury, an unusual injury for an animal to receive, it is immediately followed by bacteria; but that would require

(Testimony of Dr. George H. Hart.)

severe injury; and that would be where the infection had been invaded.

Q. And would you say that the serious condition of the cows resulting in the sloughing of the quarters, that would result from the infection, or pus-forming germ which is formed in the udder?

A. It generally follows upon a severe traumatism, such as one animal running across the corral and jumping on the udder of another animal lying down. If a cow had received an ordinary injury such as might result from a bruise, or rough handling, and before any bacteria invaded, the cow could usually by proper and prompt treatment be cured.

I have seen a Sharples Milking Machine, and have seen them in operation. I have examined the udders of cows [191] upon which the Sharples Milking Machine was being used. The last place I examined was at West Chester, at the dairy that is run at the experimental farm by the Sharples Separator Company. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharples Separator Company; I simply went there to observe it.

Q. State what you observed in the condition of the udders of those cows.

Mr. SWING.—We object to the question on the ground that evidence as to how other machines work is not admissible to show a compliance with the warranty under which the machine in question was sold to plaintiff, and we object to the question on that ground as incompetent, irrelevant and immaterial.

(Testimony of Dr. George H. Hart.)

how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT.—I will sustain the objection as to the cows at West Chester, Pennsylvania.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 19.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. In your opinion, Dr. Hart, after observing the manner in which the Sharples Separator Company's milking machine operates and works upon the udders of a cow, state whether or not, in your opinion, if the machine is handled in a careful and proper manner, it would result in producing infectious or non-infectious mammitis?

A. I have seen it operated without the production of that disease; the likelihood of producing such diseased condition would not be good; and if it were handled properly it could be operated without any infectious mammitis resulting. [192]

Q. State whether or not, in your opinion, if a Sharples milking machine were used in accordance with the book of instructions which has been furnished to the plaintiff, and which you have examined, would the operation of the machine under those conditions likely result in 20 or 30 out of 90 cows becoming permanently injured for dairy purposes, by reason of the sloughing of the bag, or the forming of abscesses thereon?

A. No, sir; it would not, if it was used by a man of ordinary intelligence, particularly the owner of a

(Testimony of Dr. George H. Hart.)

herd—the owner of the ranch, if he followed the instructions. For instance, there are men of the type of milkers that are found around this country that even though they thought they were following the instructions as given in this book by the Sharples Separator Company, he wouldn't be following those instructions, and had no knowledge of mechanics, and that type of men are not considered sufficiently capable of handling a milking machine, even though they are capable of hand milking cows.

Q. State whether or not during the year 1914, milk or any other dairy products from Imperial Valley were permitted by the City of Los Angeles to be shipped here for consumption in Los Angeles City?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial.

Said objection was then and there sustained by said Court, to which said ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 20. [193].

Cross-examination.

The germs which I have named are generally quite prevalent; they are spoken of as ubiquitous, omnipresent. These organisms that I have mentioned are found in the mouth, on the hands,—generally present; they are generally found most in most any place we go to look for them; they are varied strains. Being always present, it would naturally follow that any serious injury to the teat or udder of the cow,

(Testimony of Dr. George H. Hart.)

would be immediately followed by invasion of bacteria. Serious injury would immediately be followed by bacteria under ordinary conditions. The term "sporadic infection" is now considered to be hardly exact, because when you have sporadic mammitis, there is generally, if not always, followed by invasion of bacteria; frequently even sporadic mammitis is frequently associated with bacteria. The strain of these bacteria in sporadic mammitis, even though present—the milk from a normal cow contains bacteria, and even in sporadic mammitis there are bacteria. These strains, if they happen to be the organisms mentioned, are usually not of a sufficient pathogenic strain to be communicated from one animal to another.

Q. In the milk ducts, or in the teats of these cows, healthy normal cows, you would find these bacteria which you have stated in your direct examination, would you not?

A. You might not find those particular organisms in every cow, but they would be found in the milk; I would not say it would be unusual that they would be found, and the cow would be normal. Those germs tend to affect a healthy tissue or membranes; there may be pathogenic strains of them. Assuming that a Sharples Mechanical Milker first caused an [194] injury to a cow and an irritation and inflammation of the teat and the udder, it would be the natural thing to follow, if that injury were serious, that at a time two or three months subsequent to find that there had been invasion and pus.

(Testimony of Dr. George H. Hart.)

Q. And if there had been an injury by a Sharples mechanical milker to the teat of a cow say in the last of June or the first of July, in 1914, and an examination was not made until October—about the 20th day of October, could you determine by that examination, and on finding that there was pus at that time, two or three months after the first injury, could you determine whether the original cause of the condition then found was sporadic mammitis or infectious mammitis?

A. You would require the history of the case, and an examination of the case, with the severity of the infection and the finding of the organism and the finding of the organism would be possible three or four months after the original infection, after an animal became infected with mammitis. The organisms may remain even though the organisms appear to be normal, and start in on a new outbreak when the animal comes fresh again.

There would not be any difference in what cows picked up the bacteria between those being milked by hand and those being milked by milking machine in the same herd under the same conditions; that in itself would make no difference, whether they were milked by hand or milking machine, provided the milking machine was properly handled. If there was a string of dairy cows all subject to the same identical condition, and one part being milked by a milker, and another part being milked by hand, and the part being [195] milked by milkers were the only ones which developed swollen quarters or udder

(Testimony of Dr. George H. Hart.)

trouble, and those being milked by hand which were subject to the same identical surroundings and conditions, except as to the way they were being milked, but in those being milked by hand, the swelling rapidly disappeared, I would say that the bacteriological surroundings would have something to do with the condition of the cow that had the swollen quarters; the fact that an injury, if there is any injury, produces a more favorable field for bacteriological development if they were present than if there was no injury.

Q. Doctor, assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about 30 days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of

(Testimony of Dr. George H. Hart.)

the milker and thereafter milked by hand, following which hand milking the [196] swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked by hand; that the cows which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions, and surroundings, with one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while in those being milked by hand the existing swelling rapidly disappeared and did not reappear so long as they were milked by hand; that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine and after thoroughly disinfecting the machine and the premises, began milking all of plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form, which became so intense in the

(Testimony of Dr. George H. Hart.)

case of about 17 cows, as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were [197] milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters; that of the 60-odd remaining cows of the herd being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case or any similar case of swollen quarters in his herd before beginning the use of the milker and there has been no case of swollen quarters in his herd

(Testimony of Dr. George H. Hart.)

since the milking machine quit, would you say, under those circumstances, that the condition referred to in the question, the udder trouble of Skinner's cows, was caused by bacteria in the first place, or by some injury from the milking machine?

Mr. PARKE.—We object to the question as incompetent, irrelevant and immaterial, and assuming conditions not pertinent and not in evidence. [198].

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 21.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Just what is the question,—whether the trouble was caused by the milking machine, or whether it was caused by bacteria?

Mr. SWING.—Yes, sir; in the condition stated by my question.

A. The ultimate trouble was due to bacteria. The primary cause in this case, there being only part of the animals that were milked by the milking machine that were affected—is not that what your question said?

The COURT.—That is what he states in his question.

The WITNESS.—(Continuing.) That in this case the milking machine could have provided a condition in the udder in this percentage of animals which may have been easy milkers or hard milkers, and as the rules of the company show, should be handled under slightly different conditions, but they

(Testimony of Dr. George H. Hart.)

may not have been so handled, or they may have been handled, but nevertheless the milking machine may have, under those conditions, produced a favorable field for these bacteria to multiply. They may have caused some kind of an injury, or some kind of a reduction of those tissues through the resistences which they ordinarily have. I am familiar with the instructions furnished by the Sharples Separator Company for the operation of their machine. I do not remember that I ever found in there any place where it said to boil the teat cups: it mentions putting them in an antiseptic [199] solution. It says to put them in lime.

Redirect Examination.

This same favorable field which I spoke about might be created by hand-milking if the cows were abused—that could be created by hand-milking: any milking injury could be produced in the same way; and in the use of the milking machine upon an easy milking cow, if you use the same amount of pressure and the same amount of vacuum which you used upon a hard milking cow, the same result might have been as if you bruised the teats by hand; and if one cow became thus injured and developed mammitis, or the diseased condition developed into infectious mammitis, that condition might spread throughout the whole herd within a reasonably short time. If the cow's bag should become injured by another cow stepping on it, or kicking it, or producing a traumatic condition, and the bacteria invade, and the cow thus became infected with infectious mammitis, that

(Testimony of Dr. George H. Hart.)

might spread throughout the whole herd: after these organisms find a favorable field to grow, those particular organisms are of a more virulent strain than before it had grown on such a favorable field. There are many conditions which might create this favorable field; any kind of an injury might create a favorable field.

Testimony of Lynwood J. Kelly, for Defendant.

Thereupon LYNWOOD J. KELLY was called as a witness on behalf of the defendant Sharples Separator Company, a corporation, and said Lynwood J. Kelly having been first duly sworn, testified as follows:

Direct Examination.

My name is Lynwood J. Kelly. My business is that [200] of superintendent of the Shore Acres Dairy & Land Company, San Leandro, California. I have attended a veterinary college at the University of California; but they do not give a full veterinary degree there. I am not a graduate veterinary. They give a fairly good course in the general veterinary course, including bacteriology, to be of assistance; beyond that, there is no pretense of giving a degree. I have taken all of the work given by the University of California. I was born and raised on a ranch; for 13 years I was actively engaged in handling of stock. Since I came out of college, I have been in the dairy business, and I have spent several years with the University—two years with them as foreman of the Halsium on the dairies of which I have had charge. I have been in charge of the Shore Acres

(Testimony of Lynwood J. Kelly.)

Dairy at San Leandro since it was started three years ago last January. I was also in charge of the Sleepy Hollow Certified Dairy at San Anselmo, California; I was there for several months at a time, when the superintendent was east, at two different times. I have had some experience with the various diseases of cattle, particularly diseases of the udder; of course anybody in the dairy business has those complications to contend with. I have made a study in college, and since I came out, of diseases, and the causes and cures. Mammitis is a general term for an inflammation of the mammary gland—the glands that produce the milk—the bag in general. Infectious mammitis is an inflammation that sets up in the udder, due to the invasion of some specific organism. All of the pus-producing organisms, principally the micrococcus variety, are generally associated with *infection* mammitis. Traumatic mammitis is caused by [201] some superficial injury; there is no pus-producing germ present in traumatic mammitis. If a number of cows in a herd have swollen quarters and the quarters are, in addition to being swollen, sore to the touch and are discolored, and in many instances abscesses form, and either the quarters slough away through abscesses, or pus runs out of the teat, and samples of milk from these cows are taken, a bacteriological test or examination made, and yellow micrococcus found, and an examination of the milk taken from the cows shows that it has at first, strains of a watery substance, and later a cheese-like substance comes out, and it has a sickish, sweetish smell, under those

(Testimony of Lynwood J. Kelly.)

circumstances, I would look for an infectious form of mammitis. If there were no infection present no infectious germs, there would not be any abscesses or sloughing away, or pus from the udders, unless the bruises were of such a nature as to bring on a necrotic condition, and that necrotic condition would be brought on by the invasion, after the injury, of some pus producing organism. I think that it would be necessary for the infectious bacteria to get into the injured part before there would be any pus forms.

Infectious mammitis almost invariably comes from external sources. The organisms that are contained in the udder are as a rule nonpathogenic, that is to say, those that are not disease producing in habit; that is, they are germs, but they are not such germs as produce disease. A pathogenic germ is a germ which *much* be or is actively producing and diseased. In case of infectious mammitis, the organism invades the udder through the teat ducts and is taken on to the teat or through some abrasion of the udder from some external source. If the plaintiff [202] in this case irrigated his farm and watered his cows and washed the milking machine and the teat cups, and the milkers washed their hands from water in which yellow micrococcus similar to the yellow micrococcus was found, and an examination was made of the milk taken from the udders of the plaintiff's cows, in which pus had formed, and the quarters sloughed away in some instances, and it were found from a bacteriological test of the milk taken from the ud-

(Testimony of Lynwood J. Kelly.)

ders of the cows, and from the water taken from the common source from which the plaintiff obtained his water supply, that there was present in both the milk and water the same yellow micrococcus or infectious organism,—from such a history, the infectious form of mammitis is the first thing I would look for—I think it would be very possible that under such conditions the cows would probably become infected from this infectious germ in the water. I do not think there is very much doubt that in case a cow had traumatic or non-infectious injury, and there was present no pus generating germs, that upon proper treatment of the cow, the quarters so affected could be saved. My experience has been that traumatic mammitis is very easily overcome by proper treatment. Under those circumstances, I should use an ointment on the udder, with general massage, and look to the physical condition of the animal, make sure that the functions were working properly, and that, with the massage and the ointment, would generally bring out a cure. In case there was present on the cows a pus condition, with an abscess, and the quarters were sloughing away, when it has gotten to that point the probability is not quite so good for a cure; in case of udder troubles, the sooner the treatment the [203] better. If no pus generating, or infection gets in, my experience is that the traumatic condition can be cleared up; I never know of a cow dying from traumatic mammitis. It is possible that a cow might die from traumatic mammitis, because the origin of the

(Testimony of Lynwood J. Kelly.)

case might be traumatic, and an infection follow. But where no infection is present, I never knew of a cow dying from traumatic mammitis.

In case one cow in a herd receives an injury of some kind, and traumatic mammitis is present in the quarter or udder of one cow, and that cow becomes infected with a pathogenic infectious germ, and that cow comingles with the other cows, it is possible for the other cows to become infected from that one cow. The possible or probable manner in which infectious mammitis could be communicated from one cow to another, would include the case where the infection would be drawn from that infected quarter and transmitted by the milker from that cow to another cow; that would be the direct way. And an indirect way would be, that cow when she is milked, the last bit of milk that comes from that quarter stays on the bottom of the teat, and that cow lies down, and that rubbed off on the ground, or wherever she happened to lie down, and another cow coming in contact with that same spot is liable to pick up that organism in the same way that the cow dropped it. And if, when you milk a cow, you put the first couple of squirts of milk on the ground that is likely; because you are putting your infection on the floor where the other cows can pick it up. A cement floor, or cement or board floor, or some dry substance is necessary in an ordinary good dairy for the cows to stand on when they are milked, because it is impossible to [204] obtain any other kind of a floor; a ground floor simply sucks up the fluid, and

(Testimony of Lynwood J. Kelly.)

a board floor is a little better, not much, on account of the cracks; and a cement floor can be thoroughly cleaned. In a dairy milking in the neighborhood of ninety to one hundred cows, it will be the very best thing for the dairy to have a cement floor where the cows stand when they are being fed over the night, and while they are being milked. Stanchions are the usual methods of tying the cows in a barn you use a short rope, possibly, but it gives the cow a little too much rope to walk around when you want to handle her. The stanchion method is the ordinary way of handling cows in a barn where they use a milking machine, or not; and I would consider a dairy barn equipped with stanchions a better barn for dairy purposes than when not so equipped.

I understand the manner in which a Sharples Milking Machine operates; in my opinion, the use of a milking machine with reasonable care and prudence, cannot cause infectious mammitis among a herd of dairy cows upon which it was being used. I base this view largely on the fact that I operated a Sharples machine on a large herd for a period of nearly two years; as to how large the heard was, at present, we are milking a little over 200 cows, about 206 cows; and it will be two years the first of December that I have been using the Sharples machine. From my experience and observation, and use by myself of the Sharples Mechanical Milker over a period of two years upon a herd of cows as I have stated, I think the machine can be used successfully with cattle, without danger of injury to the cows,

(Testimony of Lynwood J. Kelly.)

provided the dairy man is careful in operating the [205] same. I have operated that machine. I recognize this book which you hand me; the cover is a little different from the book received by me; the context seems to be the same.

Mr. PARKE.—We ask to have this marked.

The CLERK.—“A.”

The COURT.—Now, if you operated this machine as directed in this book, is it a successful machine?

A. Yes.

Q. Would it hurt the cows’ bag? A. No.

Mr. PARKE.—Now, just explain on what you base your answer to the questions asked by the Court.

A. When the machines were installed, on our herd, we had that book of instructions and we followed it.

The COURT.—I don’t care anything about your herd.

A. Well, those are the instructions.

Mr. PARKE.—Well, if the Court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. PARKE.—We now offer to show by this witness that he has used a machine identical with the one in question in mechanism upon a herd of some two hundred dairy cows for a period of over two years and has never had any injury.

Mr. SWING.—Our objections to the offer as it now stands are that it does not include any offer to show

(Testimony of Lynwood J. Kelly.)

that the conditions under which this machine was operated were similar or identical with this under which the machine of the plaintiff's was operated.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.

EXCEPTION NO. 22. [206]

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. State whether or not you get as much milk from a dairy herd of 200 cows at the Shore Acres Dairy as you did from hand milking.

Mr. SWING.—We object to that on the same ground stated in our last objection; it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 23.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) The Sharples Milking Machine will cause the cow to give as much milk when used on a cow as if she were milked by hand. I base this on observation in our own herd, and other herds with which I have come into contact. When our dairy was started we took count of each particular cow, what they were producing regularly; and when the machines were put in we kept up that system we were following before, and according to our figures there was no change in the flow of milk after we put the machines in.

I visited Imperial Valley in the spring of 1912, on

(Testimony of Lynwood J. Kelly.)

veterinarian business from the University of California—working on some investigations. I visited several ranches; all of them had dairies on them. In visiting there, I had no particular reason to pay particular attention to the water, but I made some observations. From my observations in Imperial Valley, and my observations in the use of the Sharples machine at the Shore Acres Dairy, and other places, I can [207] see no reason why the Sharples Milking Machine should not be used with success in the Imperial Valley. When I was down there, there was a very severe sand storm; such a condition is not conducive to the maintaining of sterile milking utensils; and such dust as was in the atmosphere was very possibly laden with pathogenic organisms, which would be liable to gain entrance into milking utensils of one kind or another; and if there were infectious or pathogenic germs in one dairy, they would be likely to be carried to another dairy.

Cross-examination.

On an average, the dairies are apart from a quarter of a mile to one-half or three-quarters of a mile, and sometimes three or four miles. Possibly, one ranch may have developed in its cattle a virulent type of germ which can be carried from one ranch to another. The micrococcus is generally present. When I spoke of blowing, I spoke particularly of blowing around the milk house. I do not know from bacteriology whether sunshine will kill the micrococcus or not; I will not say that

(Testimony of Lynwood J. Kelly.)

it will not; I do not know whether a germ could live to blow from one ranch to another if the sun were shining. My answer about how a mechanical milker would work is not based on any operation or experience in the Imperial Valley, but in similar climates. If the first milk was squirted on the ground, the other cows would take it up on their teats, when standing on the floor. They lie down in the stanchions while you are milking other cows. It is out in the corral in the manure and in the dust.

[208]

Q. Now, I will ask you if a string of cows are being milked part by the milker and part by hand, and they are comingling, and they all lie down in the same corral, and they all get up together, would, in your opinion, there be any difference in what cow would absorb the pathogenic germ, with a cow being operated by the mechanical milker, or the one by hand; in other words, would the germs show any preference in your opinion?

A. Yes, I believe they would; if the germs were there at the teat, and the teat cup is placed on to that teat, it is there in closer contact than it would be if a man is milking by hand. The instructions call for always squirting a few drops out of the teat; that would tend to clean out the teat. The germs might be in the teat cup from previous milking, or from another cow that was affected. The instructions are that after the previous milking the teat cup is put in lime water; presumably, the germ would not then be in the teat cup; if so, it would be in latent form;

(Testimony of Lynwood J. Kelly.)

but the disease would be in one cow. You can transmit the disease by the hand of the milker just as well as by the teat cup.

Q. Now, assuming this herd is being milked part by hand and part by the milker, and that the herd—both parts are under the same identical conditions, surroundings, and so forth, with the one exception that part are being milked by the milker and part are being milked by hand, and the only cases developing swollen quarters are those being milked by the milker, and none originated in those being milked by hand, how would you explain that situation?

A. The only way I can see that is the organisms were carried by the teat cups from one cow to another, more readily— [209] that is, what I mean, because the teat cups were in closer contact than the persons's hand—the milker's hand. There is a little preference in my opinion for the transmitting of this germ between the teat cup and the moist hands of the milker; the teat cup fits closer to the teat than the operator's hand, and therefore the germ is there where it can come in closer contact with the teat duct; and whether that would explain the fact that all of these cases originated with the cows being milked with the milker and none being in those if milked by hand is hard to answer. In my opinion, the disease will be transmitted if it is of an infectious order from one cow to the other, either by hand or by machine, but by machine the disease will carry from one cow to another a little more readily.

Q. Do you say that the swollen quarter described

(Testimony of Lynwood J. Kelly.)

in my question, to which I am directing my question, was infectious, when those were the symptoms, that it appeared only in the cows being milked by the milker and that it did not appear among the cows being milked by hand?

A. I cannot tell from your description.

Q. Go a step farther. You have referred to the water containing these pathogenic germs, which you implied produced the trouble, and they washed—the milkers washed their hands in it. If the milkers washed their hands in this water, and they also washed the teat cups, assuming that they did not sterilize them as called for by the instructions, suppose they just simply washed them in this sterilized water, would there be any difference in the transmitting of the germs to the teats of these cows, between transmitting by hand from the water to the cows being milked by hand, [210] and transmitted from the water to the cows being milked by the milker?

A. I think, in the same case, your milking machine cups would be a better carrier.

Q. Granting that the cups would be a better carrier, would that explain the fact that all the cases amount in the aggregate to fifty per cent of the herd, all developed on the cows milked by the milker, and not a one developed on the cows milked by hand?

A. It is hard for me to realize such a condition, but I think it is possible, assuming in that case the milkers milking by hand didn't use any soap in washing their hands.

(Testimony of Lynwood J. Kelly.)

Q. Just simply didn't disinfect them? They simply washed in this water which we are assuming contain micrococcus citreus, or the organism testified to by Dr. Taylor, which you intimated was the cause of the contamination of the cows producing swollen quarters, and I asked you if that was the source or the origin of the trouble which produced the swollen quarters under the milker; why would it not also produce the same condition with the cows milked by milkers where they washed their hands in the same water?

A. I think it perfectly possible for the hand milking to spread the disease the same as the other, but to a little less extent.

Q. And if the hands were contaminated in the same way that the teat cups were contaminated through the water, there would be evidence of it just the same as the cows milked by hand, as the cows milked by the milkers?

A. To a less extent. It would show but to a less extent. If it did not show at all, it would be my opinion that the water was not the source of the trouble. I could not say it was [211] the cause. These pathogenic germs referred to may invade healthy, uninjured tissue or membranes; it is possible; they can stir up a diseased condition. There have been cases where the diseases have been found, but they have not been very numerous in number. I took my course at the University of California; I know Archibald Robinson Ward, B. S. A., D. V. M.; I took some courses under him; his opinion on this

(Testimony of Lynwood J. Kelly.)

subject ought to be an authority. In my opinion, the yellow micrococcus is infectious; its simple presence in the udder would not denote infectious mammitis without the inflamed condition that goes with it. It may be in a latent form, or it may be of a less virulent strain than would ordinarily produce the inflamed condition.

Q. If Dr. Ward says that he doesn't consider the orange yellow colonies of micrococcus to indicate an abnormal condition of the udder, would you think that that was an authority?

A. I would like to ask in what year that statement was made.

Q. I have it reprinted from American Magazine, February 14, 1903, which was furnished to me this year by Dr. Harding as his latest authority.

A. Well, I think that anybody who has made a study of bacteriology would not take as authority anything that is 10 or 13 years old. I do not know of any later opinion by Dr. Ward on this matter. If Dr. Ward stated that he had examined 16 healthy udders and had found this yellow micrococcus present in every case, and the others were healthy, that would not affect my opinion; because as I said before, the yellow micrococcus might be there, and at the same time they may [212] not be virulent enough to produce a diseased condition; an injured tissue furnished a better food for the propagation and reproduction of organisms.

Q. And I will ask you this question; assuming that a herd of dairy cows were being milked, one

(Testimony of Lynwood J. Kelly.)

string by a milker, and another string by hand, and the only case of mammitis to appear in the herd appeared in the cows being milked by the machine, and that when the condition so appeared, the affected cows were taken off the milker and milked together with the other cows being milked by hand, not being isolated, and that the milkers didn't wash their hands or disinfect their hands between cows, and the cows so affected got well, and the mammitis didn't spread to a single other cow being milked by hand, would you say that the cows had infectious mammitis?

A. It does not seem like it to me, no.

Redirect Examination.

Q. But if you put a milking machine upon a herd of 90 cows, Mr. Kelley, and in a period of 30 days, and thereafter continuously, the cows—at least, 25 to 30 of them—got swollen udders, inflamed, discolored, some of them broke out in abscesses, and the whole quarter sloughed away, and a great many of them have pus running from the teats, would you say from that indication that there was infectious or merely a traumatic condition?

A. From the number of cattle you speak of, it appears to be infectious.

Recross-examination.

I base this upon the number of cattle because traumatic [213] mammitis does not carry with it an infectious nature, and therefore would not spread from one cow to another. Numbers are controlling

(Testimony of Lynwood J. Kelly.)

in a way. If you went down the line of stanchions and kicked each cow in the udder, and you had 15 cases of mammitis, and you knew you had 15 cows that you had kicked, that is a case where you would have known the history of the trouble.

Q. And in this case you know that the cows have been milked by a milker?

A. There would again be the question as to the operation of the milker.

Q. More numbers then is not controlling, is it?

A. Not with the history of it, but you have got to know the history of it.

Q. You spoke of injured tissues being a better food for infectious or pathogenic germs. I will ask you, from your observation of the use of the Sharples milking machine at various places, whether or not it if properly operated, injures the tissue of the udder.

A. It does not.

Recross-examination.

I do not say that it is impossible for the milker to irritate the teats of a cow. If it did irritate the teats of the cows that would produce a field favorable to a germ.

Q. And would you say that where such is produced, a field favorable to the invasion of the germs, by a milker that is milked the cows without injury?

A. Is that hypothetical? [214]

Q. Yes, sir; it is hypothetical.

A. Considering it as a hypothetical question, I would say yes.

Q. You would say what?

(Testimony of Lynwood J. Kelly.)

A. Considering that as a hypothetical question, I would say that if the milking did injure the cattle, it would give a field—

Mr. SWING.—Just a minute. What is that answer?

(Last answer read by the reporter.)

A. (Continuing.) —give a proper field for the propagation.

Redirect Examination.

Q. Just a moment. The same field, by injury of tissue, might result from use of the hand milking, might it not, Mr. Kelly? A. Yes, sir.

Testimony of Leo Van Denenden, for Defendant.

Thereupon LEO VAN DENENDEN, was called as a witness on behalf of said defendant, Sharples Separator Company, a corporation; and said Leo Van Denenden having been first duly sworn, testified as follows:

Direct Examination.

I live at Corcoran, California, and have lived there ten years. My business is that of a dairyman. I have been in the dairy business ever since I have been a little boy. I have been in the dairy business in California since I came here. I worked for C. G. Lamberson, the last three years; his herd of cows is 120 head. I have observed the operation of a Sharples mechanical milker. I am acquainted with the ordinary diseases of udder troubles [215] of cattle; I am not a veterinary, but whenever there is any trouble, I can cure it,—I cannot explain the diseases, the names. I do not understand the tech-

(Testimony of Leo Van Denenden.)

nical names. I am familiar with swollen bags of cows, and have had occasion to treat them. I understand the theory and method and operation of the Sharples mechanical milker. My use of the Sharples mechanical milker has extended over 16 months. I have seen it operated at more than one place. From my observation, in my opinion, the use of the Sharples mechanical milker, when properly operated, cannot injure the cows upon which it is used. If properly used, it is impossible to injure a cow, because it is too soft to squeeze the teat to injure with proper care; but if you get a man to operate, say, it is just as good that way as any other, why, it will injure the cow. From my observation, it is necessary to adjust the amount of pressure and the amount of vacuum when you are changing from one cow to the other. On the pulsator there is something by which you can adjust the amount of pressure and the amount of vacuum. I have been in a position to observe, and have observed the effect of the use of a machine upon the udders of cows. I have been in a position to observe whether or not it affects or destroys the tissues, and injures the tissues. According to my observation, it does not injure the teats or udders of the cows. It cannot do it if you handle it proper. My experience with the use of the machine has been for 16 months. I got just as much milk from the cows by milking with the machine as I did by hand; just as much or more. I kept track of the milk, but I did not run the dairy

(Testimony of Leo Van Denenden.)

when it was run by hand. I ran the dairy when we put the machine in. [216]

I did not keep the pressure the same: I changed it. I did not change the vacuum; just changed the pressure. I changed the speed. I had one of those black things up in my barn for instructions; it stated "Keep your vacuum at 17"; I left the vacuum at 17. It states "pressure at 7"; there is a little hand on that pulsator; you change it.

Q. Then you did not keep it at 17?

A. That is on the gauge, on the pipe-line—on the pressure line.

Q. That is on the pressure line, not on the milker; this says, "Keep the pulsator at 55 per minute"; you kept that at 55 per minute. A. All the time.

Q. Then this pressure you are talking about is something else besides what is on this blackboard.

A. The pressure that is on the board here is the gauge that is on the pipe-line. It is not that thing that I move. That thing that I move on this machine is this little handle here (indicating); I don't know what the name of that is; it changes the pressure on the teat cups. This pressure that is talked about is the gauge on the pipe-line; that is not in here; that is in the line in the bottom where you get your vacuum pressure from. There is overhead, along above the cows, a couple of pipes carrying the air from the air-pump and the air-tanks; there are two holes in the top of the pulsator, and when that is fastened on these hooks by the pipe-line, these two openings fit over the opening in the pipe-line. The

(Testimony of Leo Van Denenden.)

pressure referred to in this metal board, Exhibit 6, refers to the pressure on that main [217] air carrier or air pipe-line above; but the amount of pressure of air in the pipe-line does not necessarily mean the amount of pressure in the teat cups. There are two pounds of pressure when this little handle is put down—when it is moved around to the point where it says "on," that lets every bit of pressure into the teat cups; and if you keep the pressure on the valve the same, and this valve is open, you get all the pressure in the teat cups—7 pounds. And if you turn this lever to the point where it says "off," you would still be getting only 2 pounds of pressure in the teat cups. If you set it at an intermediate point, you would get somewhere between two and seven pounds in the teat cups.

Cross-examination.

I don't know how the milker that the Sharples Separator sold the plaintiff in this case worked on his ranch. I never saw his milker. My answers regarding the fact that these milkers can be operated without injury to the cows is not based on any observation or experience obtained in Imperial Valley. I don't know anything about the Sharples milker down there.

Testimony of F. E. Felch, for Defendant.

Thereupon F. E. FELCH was called as a witness on behalf of the defendant, Sharples Separator Company, a corporation, and said F. E. Felch having first been duly sworn, testified as follows:

(Testimony of F. E. Felch.)

Direct Examination.

My name is F. E. Felch. I live at Phoenix, Arizona. I am in the dairy business. I do not know how long I have been in the dairy business; I have been in it [218] for 30 years on my own accord. I have been in the dairy business in Phoenix for 15 years—that is in the Salt River Valley. As to the climatic conditions in the Salt River Valley, it is very warm. I have never been in the Imperial Valley. I have not particularly observed the Government weather reports from Imperial Valley as to heat conditions there. In the Salt River Valley, in the summer, it gets pretty hot—up to 120 sometimes and over. The Salt River Valley is a very extensively irrigated country, and my dairy is in the irrigated district. During the past four or five years I have milked from 30 to 90 cows. I understand the manner in which the Sharples mechanical milker operates; I have used one; and I have observed the use of one other than the one which I use myself. From my observation and experience, the Sharples mechanical milker can be used upon a herd of dairy cows by proper use and management, so as not to result in injury to the cows; I know this from experience; I have used it three years and had no injury to the cows. I have observed the use of it in some other dairies in the Salt River Valley—Mr. Harris' dairy; but I did not have much time to observe the other fellows'. My milker was used by myself, or my sons at times. During the time that I have been using the milker on my cows, I have not had any udder

(Testimony of F. E. Felch.)

trouble. I get as much milk from my cows when I am using the Sharples mechanical milker as when I milk by hand—I get more, considerably more; I got 10 per cent more on the start above ordinary hand milking. I have an instruction-book from the Sharples Separator Company. This book which you show me, marked Defendant's Exhibit 1, in evidence in this case, is the same thing as the book of instructions I [219] received. I did not receive one of those tin plates of instructions, such as plaintiff's Exhibit No. 6; I used the book altogether. My machine was installed by Mr. Albert J. Reed; he instructed me in the use of the machine. I did not know anything about the use of the machine other than the instruction received from Mr. Reed, and through the literature and the instruction-book of the Sharples Separator Company; I followed out the instructions as given in the instruction-book as nearly as possible.

Cross-examination.

I have never been in Imperial Valley, and do not know the conditions that exist there, and do not know the case of the trial by Mr. Skinner of the Sharples milker. In my opinion, it is not possible to injure cows with the Sharples mechanical milker, producing a condition similar to mammitis, if you use it according to instructions—I do not think it is.

Q. If the machine is left on for some length of time, would that produce it?

A. Well, that is the operator's fault.

Q. Well, answer my question? Will that produce

(Testimony of F. E. Felch.)

a condition similar to that?

A. I don't know; I take mine off. I think I was examined in a deposition taken at Phoenix.

Q. You were examined in Phoenix at the time the deposition was taken. You didn't make this statement? (Reading:) "You can cause garget by bruises of any kind in the udder, or you can cause garget by hand, by taking and pulling the teat after the milk is out of it, by staying with it, and I presume [220] to say that the Sharples machine, or any other machine, if it was not taken off after the milking is done, might cause garget."

A. That is exactly what I would say right now, if you were to put it to me the same way.

You adjusted this little spigot here which gives you more or less pressure. I have milked cows by hand; some teats of a cow milk easier by hand than other teats; there is a variation in teats. The idea of this little spigot is to adjust the amount of pressure to each cow's bag, according to the resistance of that cow or the susceptibility of that cow.

Q. Is it possible with this machine to adjust that, so you can vary the amount of pressure upon the different teats, according to the conditions of that teat?

A. Why, no.

Mr. SWING.—That is all.

Mr. PARKE.—That is all.

The WITNESS.—What do you mean, each teat separately; is that the question?

Mr. SWING.—Yes.

A. No; when you change the pressure you change it on them all.

Testimony of F. L. Briggs, for Defendant.

Thereupon, F. L. BRIGGS was called as a witness on behalf of said defendant, Sharples Separator Company, a corporation, and said F. L. Briggs having first been duly sworn, testified as follows:

Direct Examination.

My name is F. L. Briggs. I know Dr. Walter J. Taylor. [221] I was with him in the Imperial Valley on or about October 10, 1914. I went with him to the ranch of W. W. Skinner, the plaintiff in this action, along about the middle of October, 1914. That was the time that Dr. Taylor took samples from four of the cows of Mr. Skinner. I don't remember whether we talked to Mr. Skinner. I am in the employ of the Sharples Separator Company, and familiar with their milking machine. They do not make more than one kind of milking machines; all machines are like the one here before me, identical; and that was true in 1914. I have visited a great many dairies throughout the country. The average dairy is equipped with a cement floor and with stanchions; and that is true whether they are using a machine or not. I saw the gasoline engine which Mr. Skinner was using on his place; I believe it was an International. I am familiar with the value of machinery such as gasoline engines, after they have been used for a short period of time; I have sold them. In my opinion, presuming that Mr. Skinner paid \$175 for the gasoline engine in question about February 1, 1914, the value of that engine in use in December of that year would be fifty per cent, fifty.

(Testimony of F. L. Briggs.)

cents on the dollar; I think I could sell it for that price. If a man were using it for separating milk from ninety cows, the value of it to the man so using it would be the price of it when new.

Testimony of A. Edgar, for Defendant.

Thereupon A. EDGAR was called as a witness on behalf of said defendant Sharples Separator Company, a corporation, and said A. Edgar having been first duly sworn, testified as follows:

Direct Examination.

My name is Arthur Edgar, and I am president of [222] Edgar Bros. Company. I could not state whether I entered into a contract with the Sharples Separator Company during the year 1914. I know absolutely nothing about this purported contract which you show me. I observe the signature here, Edgar Bros., by J. H. Edgar; that is Mr. J. H. Edgar's signature. He is general manager of our company. I do not believe that I ever saw this contract, or a copy.

Q. This contract was signed Edgar Bros. Company by J. H. Edgar, on the 12th of May, 1914.

A. I have actually no knowledge of those contracts; I never saw one of them; I have no knowledge of them whatever, in any way. I don't know on what date my company became the agents of the Sharples Separator Company. I know absolutely nothing about the sale of the 4th unit to Mr. Skinner. He didn't buy it from me personally. The only knowledge that I could give as to whether or not I had any

(Testimony of A. Edgar.)

contract with the Sharples Separator Company to act as their agents before the 12th of May, 1914, is just hearsay. I have no knowledge personally.

Mr. PARKE.—We offer in evidence the contract so signed by Edgar Bros. Company by J. H. Edgar and ask to have it marked Defendant's Exhibit 2. "To be annexed hereto."

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and not appearing it is a contract that has ever been accepted by the Sharples Separator Company.

The COURT.—Objection sustained.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 24.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

[223]

Mr. PARKE.—We desire at this time to read in evidence the deposition of Albert J. Reed, taken for and on behalf of plaintiff pursuant to notice.

Said deposition was thereupon received and read in evidence in the cause, and was and is in words and figures as follows, to wit:

Deposition of Albert John Reed, for Plaintiff.

Direct Examination.

My full name is Albert John Reed, and my address is Davis, California. I installed the Sharples mechanical milking machine on the ranch of W. W. Skinner, the plaintiff in this action; I installed it on February 1, 1914. It was a Sharples mechanical

(Deposition of Albert John Reed.)

milker of three units. I installed the same kind of milking machines for parties around Phoenix, Arizona. I know F. E. Felch, and I installed on Felch's ranch a Sharples mechanical milker similar to the one at Skinner's ranch. I know Mr. Hansen down there near Phoenix that has a Sharples mechanical milker. I don't know M. S. Autry, who has a ranch down near Phoenix, nor James Willis, nor Edward L. Stalm. I have seen the machines that Hansen and Felch were operating at that time on their ranch near Phoenix. I installed them.

Q. Were they the same kind of machines that the plaintiff W. W. Skinner was using near El Centro?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.

The COURT.—I will sustain the objection.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 25.

And said defendant, Sharples Separator Company, a [224] corporation, now assigns said ruling as error.

I installed the machine on Mr. Hansen's place and Gus Harris' place and Mr. Skinner's place. I was at Skinner's ranch several times.

Q. When you were there, on that ranch, there was a dairy barn?

A. A dairy shed. It has a thatched roof, two rows of stanchions, two rows of mangers, two concrete platforms for the cows to stand on and one concrete gutter on the south side; the gutter on the

(Deposition of Albert John Reed.)

north side was without a concrete bottom; there was a wooden floor through the center. He had a milking house and power house combined, about 50 feet south of this dairy shed. The milking machines and the dairy shed connected up to the power-house and operated from the power-house. There was a water hole located between the power-house and near the power-house and dairy shed; it is similar to all water holes in Imperial Valley for washing up dairy utensils; it was a hole in the ground with water running through; it was not fenced off from the rest; it was open so that the cows could get in there and the other cattle. The cows down there were watered in holes much the same as others, the one from which the water was taken out to wash the dairy utensils and these water holes were fenced off with barb wire, fencing off a place about 16 to 20 feet; it was boarded up so that the animals could get up to this board and drink over it much the same as a trough. The water came from the main irrigation ditches; it was not well water of any kind, it was not pump water. The dairy shed was kept in as good cleanliness as it was possible to keep; it was clean all but the gutter on [225] the north side, and that, having no bottom, was more or less dirty. The gutter on the north side was without a bottom and when you took the manure out you took some dirt with it; it was not easy; and afterwards filled it in with dry sand; and the same process would go on each time. It could be cleaned out, but not as clean as it should be. Later on I made suggestions to Mr. Skinner by

(Deposition of Albert John Reed.)

which he could remedy the trouble; I put in two board planks, 2 by 12, and filled in the bottom; I did this in the latter part of October or the 1st of November, 1914. All of this testimony refers to 1914. I was there during the summer of 1914. I could not say what the temperature was; it was pretty warm; I should imagine it to be over 100. There was a water hole in there when I first went down, and I saw animals in there occasionally; I saw a pig in there drinking once; also a calf; and maybe cows, but very seldom. There was not any pen or enclosure in which Skinner kept sick calves anywhere near the water hole. I did not see any sick pigs in this water at any time, but I saw sick calves in there occasionally. As to what was done with this water in the water hole, with reference to the milking machine when I first went down there, the water was taken out of the hole and placed in a jacket which Mr. Skinner had fixed around his exhaust pipe of his gasoline engine, and that water was warmed and used to scald the teat cups and wash the dairy utensils; the water next to the exhaust pipe was boiled.

When I went down there the first time there were none of the cows down there at any time affected with swollen udders. At visits after that, there were; those [226] cows that were affected in this way were not separated from the rest of Skinner's cows. I would like to qualify that answer by saying that when I was down there in June or July there were six or seven cows separated from the rest.

(Deposition of Albert John Reed.)

A veterinary came down in the latter part of June to find out what was the trouble with the cows. I remember a statement that was made by this veterinary in my presence and also in the presence of Mr. Skinner as to what was the matter with these cows; the veterinary was called out and questioned as to the condition of these six or seven cows—perhaps there were more than that,—as to what was the trouble with them, and he proclaimed it contagious mammitis; those present there at that time when that statement was made were the veterinary, myself and Mr. Skinner. I do not remember the veterinary's name; he came from El Centro; he said, in substance, that the cows had contagious mammitis; and Mr. Skinner said that he did not believe it. Prior to June 25, 1914, there must have been 20 cows at one time or another that had swollen quarters.

I did not keep any account at any time while I was there of the amount of butter fat that came from the different cows, nor of anybody while I was there; I did not see any account. I could not say whether or not there was any difference in the amount of butter fat that the cows gave before or after using the machine; I would like to qualify that answer—very naturally, when you have 20 cows with swollen quarters they will not give as much butter fat as before that.

When I started down there on this machine, Mr. Skinner took interest in it. He had hired help. One of his sons [227] was there at the time. One son at that time was 19.

(Deposition of Albert John Reed.)

There was a calf pen alongside of this water hole; sick calves were not kept in that pen,—they were kept in that pen until they were recovered. I remember making a statement in which I said they took the water in which they used the teat cups out of a cistern and that this water was inhabited by sick calves and hogs. That statement is true. That cistern that I referred to is the water hole that I have testified about before. At the time when I was there in October I used two units; I should say that one of those units was from Edgar Bros. and one came from Sharples. I remember making a statement that the gutters were not fixed right, did not run off right, and that it was an awful dirty place; and it was a dirty place. The water in this hole came from the irrigation ditch, and was allowed to run into this hole and stand there; as to whether the water in this water hole was dirty or clean, it was renewed from time to time when it got low. It could not run off any place; it was not clean water. Before I went down there, cows were milked by hand; when I first came down, they were all milked by hand; the men did not wash their hands during the milking. They only washed their hands when they came out to milk the cows, and then from a private cistern at the house. The water in this cistern at the house came from the irrigation canal on the West road. I kept the parts of the milking machine in water between the milkings. Under ordinary conditions, once a week everything was cleaned thoroughly. But water was put into the

(Deposition of Albert John Reed.)

teat cups all the time. The teat cups and other parts connected with them were the only parts kept in water, to keep them [228] from hardening. Skinner was not keeping the teat cups in water when I came down the first time. I kept these teat cups in water and they stood in a pail of water over night when I was not using them. This water came from this water hole of which we have been speaking, in the same fashion as the other water used for dairy utensils; put into this tank in which was the exhaust pipe of the engine and was then taken out from there and put into the machine. Skinner did have some sick calves. They were taken out of the pen and put on the outside. Then they were outside they got into this yard, and I saw one or two in there. The water that was used for the purpose of washing the dairy utensils came in direct contact with the exhaust pipe and it boiled.

Cross-examination.

Mr. SWING.—Q. For whom did you install, for whom were you working when you installed the mechanical milker?

Mr. PARKE.—We object to that question on the ground that it is not proper cross-examination and was not called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 26.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Deposition of Albert John Reed.)

A. I was working for the Sharples Separator Company.

Q. How long have you been working for them, approximately?

Mr. PARKE.—We object to that question on the ground that it is not proper cross-examination and was not [229] called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 27.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I started to work for them on the first of June, 1913, and continued to work for them until January 15, 1915. Skinner put the planks in the gutter on the North side of his shed not more than a week after I suggested it; I made the suggestion the last time I got down there,—the last of October. I am acquainted with a number of other dairies in Imperial County, and have installed milkers upon them.

Q. About how many dairies are you acquainted with down there?

Mr. PARKE.—We object to that question upon the ground that it is not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 28.

And said defendant, said Sharples Separator

(Deposition of Albert John Reed.)

Company, a corporation, now assigns said ruling as error.

A. I am acquainted with some half a dozen down there. The water hole to which I refer as being near the milk-house, was not fenced when I first went down there; it was not fenced shortly after I went there the first time; I first noticed that it was fenced some time in June. The first time I saw the calf in this water was before it was fenced. I did not see any in the water after it was fenced. The cattle had other drinking places, and only occasionally came [230] to this place to drink. This water in this water hole was settled water, and the water which was put into the drinking hole was also settled water. With reference to this water in this water hole near the milk-house, when I testified the plant, I instructed Mr. Skinner in the proper use and care of the milking machine and its parts, and how to clean them. I demonstrated to him by cleaning them myself. I used the same water; the water came from this water hole.

Q. Did you ever warn Skinner not to use water out of this water hole?

Mr. PARKE.—We object to that question on the ground that it is not proper cross-examination.

The COURT.—I will overrule the objection.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 29.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

(Deposition of Albert John Reed.)

A. When I went down in June and July I did.

Q. What was done?

Mr. PARKE.—We object to that question as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 30.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Boiled water was used then; he followed my suggestion.

Q. How many times were you there, at Skinner's place?

Mr. PARKE.—We object to the question as not proper [231] cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 31.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Well, I have been there a dozen times, off and on. I was there first in the first part of February, and remained for twelve or fourteen days. The occasion of my being there at *time* time was to install a mechanical milker. I was next there in the latter part of March, or the first of April.

Q. About how long were you there at that time?

Mr. PARKE.—We object to the question as not proper cross-examination.

(Deposition of Albert John Reed.)

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 32.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Two or three milkings.

Q. What was the occasion of your being there that time?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 33.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Trouble.

Q. What was the trouble?

Mr. PARKE.—Objected to as not proper cross-examination. [232]

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 34.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Skinner's trouble with his cows.

Q. What was the occasion of your being called in?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

(Deposition of Albert John Reed.)

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 35.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I was the expert in charge.

Q. An expert in charge for whom?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 36.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Sharples Separator Company.

Q. When were you there next?

A. I was there in May, next.

Q. How long were you there at that time?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception. [233]

EXCEPTION NUMBER 37.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I was there a couple of days, anyhow.

Q. What was the occasion of your being there that time? A. Trouble.

Q. And when were you next there, if you remem-

(Deposition of Albert John Reed.)

ber? A. June 25th to July 7th.

Mr. PARKE.—We object to this line of questioning as not being cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 38.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. How long were you there that time?

A. June 25th to about July 7th.

Q. What was the occasion of your being there that time?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 39.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Skinner stopped his machine and I was sent for to restart it.

Mr. PARKE.—I move to strike out the answer of the witness.

Said motion to strike out was then and there denied [234] by said court, to which ruling said defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

EXCEPTION NUMBER 40.

Q. You say you were sent to Skinner's place—

(Deposition of Albert John Reed.)

by whom were you sent?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 41.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. The Sharples Separator Company: and while there that time on the Skinner ranch, I restarted the machine. It was operated by Skinner's lads, a boy and a hired man under my direction.

Q. When next were you there?

Mr. PARKE.—We object to the question as improper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 42.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. October 20th, to December 20th.

Q. What was the occasion of your being there at that time?

Mr. PARKE.—We object to the question on the ground that it is improper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception. [235]

EXCEPTION NUMBER 43.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. To take charge of the mechanical milker. I

(Deposition of Albert John Reed.)

was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker.

Mr. PARKE.—All of this is objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 44.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) Cows were milked by hand when I went there on my second visit; there were two or three that had swollen quarters, that were being milked by hand. On my third visit, some half dozen cows, perhaps, were being milked by hand.

When I got there in June they were all being milked by hand. They had quit using the milker and I started it again.

Mr. PARKE.—All of this we object to as not being proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 45.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) I started the milker on all the cows.

Q. After that, were any of the cows taken off for any [236] reason and milked by hand?

Mr. PARKE.—We object to the question as not

(Deposition of Albert John Reed.)

being proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 46.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Some dozen or so were taken off and milked by hand and six or eight were isolated. I was in charge at that time, and this was done under my instruction.

Q. For what reason?

Mr. PARKE.—We object to the question upon the grounds that it is not proper cross-examination, and is asking for the opinion and conjecture of the witness, and not for a statement of fact.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 47.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. The condition of the cows warranted it.

Mr. PARKE.—I move to strike out the answer of the witness as not responsive.

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 48.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

Q. What was the condition of the cows? [237]

Mr. PARKE.—We object to the question as incompetent, irrelevant and immaterial, nor proper cross-

(Deposition of Albert John Reed.)

examination, and asking for the opinion and conjecture of the witness, and not a statement of fact.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 49.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. The whole udder was swollen, there was high fever and individual cows were in very bad condition.

Q. How soon did this condition appear after you had started the milker upon them?

Mr. PARKE.—We object to the question as not being proper cross-examination.

The COURT.—The objection is overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 50.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Directly. When I went back in October, I started the milker on one string of 30 cows.

Q. After you started the milker on that string of 30, were any taken off and milked by hand?

Mr. PARKE.—Objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 51. [238]

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Some two or three during the first two weeks, and then one or two as warranted, later on.

(Deposition of Albert John Reed.)

Q. Why was the milker taken off these cows?

Mr. PARKE.—We object to the question on the grounds that it is not proper cross-examination, not having been brought out in a direct examination, and calling for the conjecture of the witness, and not for a statement of facts.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 52.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Owing to swollen quarters. Fresh cows come in off and on. When I started in February, somewhere around 90 cows, some three strings were milking.

Q. I will ask you if Skinner was getting as much milk in quantity in December when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used?

Mr. PARKE.—We object to the question on the ground that it is not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 53.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. In my opinion he was not.

Mr. PARKE.—I move to strike the answer out as not [239] responsive, and not based upon a statement of facts.

(Deposition of Albert John Reed.)

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 54.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) It is a fact that some of Skinner's cows, after this inflammation had set up in their udders quit giving milk altogether.

Q. And some quit giving milk in one quarter, and some in more quarters?

Mr. PARKE.—We object to the question as not proper cross-examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 55.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Yes.

Redirect Examination.

I did not keep any count of the amount of butter fat or milk from any of these cows, so that I could not accurately state just how much less there was from any particular cow in the herd at any particular time. Neither I nor Skinner, nor anybody kept a table showing how much these cows gave at any time. That is done in some dairies.

Mr. PARKE.—I desire to read in evidence in this cause the deposition of F. A. Frank taken for and on behalf of the defendant, Sharples Separator Company. Said deposition [240] was thereupon received and read in evidence in said cause and is in words and figures as follows, to wit:

Deposition of Frederick A. Frank, for Defendant.

Direct Examination.

My name is Frederick A. Frank. I reside in Philadelphia. I am employed by the Sharples Separator Company and work for them in various capacities. I was employed by the Sharples Separator Company during the year 1914, as sales-manager of the San Francisco office. I left the employ of the Sharples Company in January, 1916. My duties as sales-manager of the Sharples Separator Company was to conduct the sales work in connection with the instructions of the home office and look after the business generally. I know F. L. Briggs. He was in the employ of the Sharples Separator Company. I could not give the period of time. He was there during 1914. He was there when I went with the company and he was still there with the company when I left. His position was milking machine expert. His duties were to look after the milking machines, their installation and troubles which customers occasionally have and see that that particular line of work was carried on properly, and to instruct the dealers and agents in the proper use of the machine. He received instructions from me and worked under my supervision.

I know W. W. Skinner. We received in March, 1914, an order for the mechanical milker from W. W. Skinner, which order was in accordance with our usual method of business, and the milking machine was delivered to him and set up in accordance with our usual method. The order was received on the

(Deposition of Frederick A. Frank.)

usual printed form as offered in evidence. I instructed [241] F. L. Briggs to go to the ranch of W. W. Skinner, at El Centro in 1914. Skinner was complaining that he thought his milker was not operating properly, and in accordance with our usual custom, I sent Briggs there to see if he could not be satisfied, or rather, I sent Briggs there to see if he could not overcome his difficulty. I do not remember exactly what instructions were given to Briggs, but simply wrote or told Briggs personally to follow out his usual custom or usual practice in attempting to satisfy customers or to correct any faulty installation, and find out what was wrong and straighten out the trouble.

I know Albert J. Reed. He was with the Sharples Separator Company as a milking machine expert for a period of about nine months, and his employment ended with us prior to October, 1914. I think he had not been working for us for two or three weeks prior to October 20, 1914; his account had been squared up and been checked out. Mr. Reed was engaged to install milking machines and to instruct the purchasers of the same in their proper use. He worked under the direction of the San Francisco office. He might have been working for us some time in October, but was not working for us on October 20, 1914, or thereafter; I could not say how long before October 20. My best judgment is that he was not working for us for two or three weeks before the 20th of October, 1914. I do not know whether or not Reed went to the ranch of W. W. Skinner dur-

(Deposition of Frederick A. Frank.)

ing the month of October, 1914. Mr. Reed left the San Francisco office, and it is my belief that he left for the W. W. Skinner ranch. He came in to call upon me before he went to the ranch of W. W. Skinner. I advised Mr. Reed that if he would call upon Mr. W. W. Skinner he could [242] undoubtedly secure employment with him as a milking machine operator; at that time Mr. Reed was not in the employ of the Sharples Separator Company. At the time when Mr. Reed was at the ranch of W. W. Skinner in October, November and December, 1914, I do not know in whose employ he was; he was not in the employ of the Sharples Separator Company. I didn't send Reed to the ranch of W. W. Skinner, as an employee of the Sharples Separator Company. On October 20, 1914, when Reed went to the place of W. W. Skinner at El Centro, Reed was no longer in the employ of the Sharples Separator Company, and I gave him no instructions as to what his future work would be, but suggested to him that if he was looking for employment he could possibly obtain it from W. W. Skinner. I did not give him any instructions to go back to the Skinner place and restart the milking machine and endeavor to get it running right, because he was not in the employ of the Sharples Separator Company.

Cross-examination.

I believe that Mr. Skinner bought the milker which is the subject of this suit in March, 1914. He signed a written order such as was referred to by Mr. Sharples and a copy of which has been offered in evi-

(Deposition of Frederick A. Frank.)

dence—Plaintiff's Exhibit 1; so that the order and the guarantee on the back thereof was the contract at that time which was made between me and him, I representing the Sharples Separator Company, and he acting for himself. The machine was furnished to him and set up either immediately thereafter, or very shortly thereafter, within a reasonable time. He first complained to me that this milker had damaged his cattle in June, 1914, [243] I sent a man down to advise Mr. Skinner what was causing the difficulty; he was to do anything that was necessary to straighten things out. I believe it was the same Albert J. Reed; I am not sure whether Briggs went down in answer to the first complaint. Reed was down there during the time between June 20 and July 7. I do not know whether he was at the Skinner ranch all that time or not. There were several other machines in the same valley, and he was around among them all. I am not able to state definitely whether or not Reed operated Skinner's machine during the period from June 20 to July 7, 1914. The Sharples Separator people paid for his services during that period. He reported as to his operations on the Skinner milker. He reported to me in writing. I received the reports he made out; I do not know where they are now; they are somewhere in the correspondence. I cannot answer where they were at the time I left the employ of the Sharples Separator Company. I do not know where they were. They might have been enroute with somebody. It is my belief that shortly after Reed left, on July

(Deposition of Frederick A. Frank.)

7th, Mr. Skinner advised us that the machine was still unsatisfactory. I sent F. L. Briggs down to the Skinner place after July, 1914. I do not know whether Briggs made more than one trip, but I do know that he went down some time during October, 1914. He might have gone down in August, 1914. He advised me that Skinner was still dissatisfied. I suggested that if it could be arranged, Skinner should hire one of our men that we were letting go. It was pursuant to that suggestion that he afterwards asked Mr. Reed to come on the 20th of October. I sent Reed down pursuant to that suggestion. I do not [244] know the exact time Mr. Reed stayed down there. It was some time; I believe Reed wrote me several letters in regard to the results he was getting, and that I replied to the letters. I do not remember whether I kept copies of the letters I wrote him. We made a practice of keeping copies of all official outgoing letters,—except what letters were written personally. I do not know where are Reed's letters to me during the period from October 20, 1914, while he was down at Skinner's place. They were put in the files with the rest of the daily correspondence. I do not think I shipped those letters to the home office at West Chester, while I was still in charge of California. About October, 1914. Skinner talked to Briggs about his employment of a competent man. I do not know whether Briggs is still employed there. Shortly after Reed went down there on October 20, 1914, he asked Skinner for his salary or part of it. Then Mr. Skinner advised him that he, Reed, was

(Deposition of Frederick A. Frank.)

working for the Sharples Separator Company, and Reed advised me of Skinner's attitude, and I advised Reed that such was not the case, that he was working for Skinner; and I believe that Reed notified Skinner of this fact, too.

Mr. SWING.—I ask that the last statement be stricken out.

The COURT.—That will be stricken out.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 56.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The WITNESS.—(Continuing.) I don't know who actually paid Reed; the Sharples Separator Company paid him no [245] salary during the period from October 20th to December 20, 1914. We paid his railroad fare. The Sharples Separator Company did not pay his wages. We did not pay for his services during the period I have just mentioned. The company paid his railroad fare down. He came back with a big yell, "He never got any money from Skinner." I did not pay his railroad fare down until after he returned. It was my opinion he got no wages while he was down there. I do not think that he was taken into the employ of the Sharples Separator Company after that—not as long as I was in the employ, any way. I do not remember getting a telegram from Reed on December 20, 1914, while he was still down at Skinner's place—I have no recollection. If there is one it would be in the files of the Sharples Separator Company. To

(Deposition of Frederick A. Frank.)

my knowledge, Reed was an experienced and skillful operator of such a machine as Mr. Skinner bought. While Reed was down there from October 28, 1914, and thereafter, I did not give him any directions at all. Reed reported from time to time as to how his work was going along, and one time things were going very nice, and in a day or two he would have two or three cows go wrong. I was interested in keeping Skinner satisfied, because I was hoping to get a lot more business down there. I asked him to write to me, keeping me advised of conditions. I am now *in the* employed by the Sharples Specialty Company; the president of this company is P. T. Sharples, a son of P. M. Sharples. P. T. Sharples has no connection with the Sharples Separator Company; that company sells certain manufactured goods.

Mr. PARKE.—The defendant rests. [246]

Testimony of C. F. Boarts, for Plaintiff (in Rebuttal).

Thereupon C. F. BOARTS was called as a witness in behalf of the plaintiff, in rebuttal, and having been first duly sworn, testified as follows:

Direct Examination.

I live eight miles northeast of Brawley, in Imperial Valley, California. My business is that of general ranching and dairying. I have been in the dairy business this time five years last August. I have handled milk cows off and on practically all my life. I am familiar with the common diseases of cows in

(Testimony of C. F. Boarts.)

a general way. I have treated my own cows when some trouble existed. I am familiar with the operation of a Sharples mechanical milker. My experience is based on use on my personal ranch and observation on several others. I operated a Sharples mechanical milker on my ranch a little better than two months. I know W. W. Skinner, the plaintiff in this case. I was at his place the latter part of February or the first part of March, 1914, after he started to use the Sharples mechanical milker. I looked around his place and noted the conditions. He had a very good dairy-house; his dairy-barn was—

Mr. PARKE.—We move to strike out the answer of the witness as to "very good" as to being a conclusion of the witness.

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 57.

And said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error.
[247]

The WITNESS.—(Continuing.) His dairy barn had a cement floor all the way through; I believe there was one side that had a gutter that was not finished. He had his pools fenced at that time, and the general condition as to cleanliness in the barn was good. There was no loose manure in the gutters and the cleanliness of the place struck me as being very good. The water supply was not out to his pool, but was close by, and the water looked good in the pool. I have seen three of these Sharples me-

(Testimony of C. F. Boarts.)

chanical milkers work; I have seen Mr. Skinner's machine working on one occasion. In another dairy, I seen another work on two different occasions; and in my own, covering the period that it was in operation there. The plaintiff's milking machine was similar to my own.

The COURT.—It is stipulated here there is only one machine.

Mr. PARKE.—We so stipulate.

The WITNESS.—(Continuing.) In my opinion, the Sharples Separator machine was not a successful machine; the machines under my observation have failed to milk the cows without injury to the cows.

Cross-examination.

The operation of the machine caused swollen udders. By "the operation of the machine" I mean the act of drawing the milk and the functions it was supposed to perform causing swollen udders. By "drawing of the milk" I mean from the cow, by the different machinery. This (indicating machine on the floor) is like the machine that I used. Let me see the teat cup. (Receiving teat cup.) It seems to me there was a little difference in the teat [248] cup of the machine, the one that was furnished me; it seems to me there was a difference. If it should appear from the testimony that the Sharples Separator Company never made but one form of teat cup, I would not say that I was infallible as to whether this teat cut was like the one furnished me, but there seemed to be some difference in that. I am unable to state to the jury what part of the machine was

(Testimony of C. F. Boarts.)

wrong, or I would have corrected the trouble. The machine drew the milk from the cows. So far as I could see, the machine did not work right from a mechanical standpoint—it did not draw the milk and perform its mechanical functions all right; if it had *of drawed* the milk and performed its mechanical functions all right, it would not have done any injury. As to whether, leaving aside the claim of the effect it had on the cows, there was anything wrong about the mechanical operation of the machine, if the machine operated as their expert claimed it should.

Q. If it had not hurt your cows, you would have no complaint about your machine and the way it operated?

A. I am not certain about that. As to what causes me to be uncertain there is quite a loss of butter fat or milk, and whether it is wholly attributable to swollen quarters, or whether it would come from the milker if these quarters had not occurred, I am not able to say. As to whether the machine got as much milk from the cows as I should from hand-milking, it did not from some of the cows. I did not keep an individual record, although we had a general record coming from what each cow was producing; that is, to put it down in pounds and tenths of pounds, I did not keep a regular record. I operated my [249] machine part of the time and my milker operated it part of the time. I believe my milker was about 27 years of age to the best of my knowledge. My cows got the water from a tank

(Testimony of C. F. Boarts.)

that supplies the house and other parts of the ranch. That water all comes from the common source, the Imperial Canals, the Colorado River, the only source of supply we have. That is not true of every ranch in the Imperial Valley; there is a few wells has been drilled; but in 1914 practically everybody who had dairy herds was using water from these canals, and practically every dairy herd to-day. I visited Mr. Skinner's ranch the latter part of February, 1914, or the first of March of the same year. It is my recollection that the pools were fenced at that time. I had no knowledge before or after that date as to whether Mr. Skinner had permitted his cows to walk into the water ditches. I permitted my cows to go into the water ditches for possibly two months after the time I first put the cows on the ranch—a little better than five years there was possibly two months. I washed my teat cups in water that was taken from the tank that we used for domestic as well as other purposes; we did not boil the teat cups after we had milked—not the rubber parts. By way of sterilization, the teat cups were washed with warm water—well, they were rinsed with cold water, washed with warm water with the brushes as directed, and then put in lime water as directed. Personally, I consider a cement floor an improvement to a dairy barn; it adds to the facilities for keeping that barn clean. I use stanchions; I consider stanchions an essential and necessary part of a good dairy barn in feeding; I consider them [250] a benefit in handling of the feeding.

Testimony of H. D. Nye, for Plaintiff (in Rebuttal).

Thereupon H. D. NYE was called as a witness for the plaintiff, in rebuttal, and said H. D. Nye, having been first duly sworn, testified as follows:

Direct Examination.

My name is H. D. Nye. I live at El Centro. I have lived there a little over two years. I have held an official position—inspector of the State Dairy Bureau. I held that position with reference to Imperial County from August 28, 1914, until June 1st, 1916. My duties as such were the inspection of dairies as to their sanitary condition, and the inspection of retail milk routes and creameries having to do with the production and sale of milk. I visited Mr. Skinner's dairy in my official capacity more than once—about five times. The first time was near the first of September, 1914. The second time was the latter part of September, 1914; the third time was about the middle of October, 1914; and the fourth time in December, 1914. The sanitary condition of that dairy was good. I never found a mud hole in that dairy—I mean in the corrals or around the buildings. The barn was clean; the milk-house was in good shape; the water holes where the cows drank, the settling-basins, as we call them, were fenced, and planked so the cows could drink out of them without getting into them, and the water was as clear as we have ever been able to get water in the Imperial Valley. I have never seen any stock or any foreign matter in the ponds of any description. The utensils, both the milking machine and other uten-

(Testimony of H. D. Nye.)

sils I saw there, were always clean and sweet smelling. The cows once in a while would be a little muddy [251] around the lower part of the legs, but aside from that were in very good condition.

Cross-examination.

Skinner had a cement floor; it is not compulsory, but it does make the dairy that much cleaner. I would say that a cow shed in which cows were kept that did not have either a cement or board floor is a sanitary dairy. If they milk cows in the yard, and only clean the droppings out once a month, that would not be a sanitary dairy. It is more sanitary when they have a wooden or cement floor; a cement floor is considered the most sanitary. Stanchions are an advantage or benefit to a dairy barn, whether you use a milking-machine or not.

Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State Dairy Inspector down there, were such that milk and dairy products were not permitted to be shipped from Imperial Valley into Los Angeles City for consumption.

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 58.

And said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error.

The WITNESS.—(Continuing.) Mr. Skinner did

(Testimony of H. D. Nye.)

not ever make any application to me for a permit or certificate for his dairy as to cleanliness. I did not, acting on behalf [252] of the Dairy Inspector's Office, grant permits to sell milk to customers; that was not done in Imperial Valley at that time, to my knowledge. I would not consider a dairy which had a mud hole a sanitary dairy.

Testimony of H. Rodgers, for Plaintiff (in Rebuttal).

Thereupon H. RODGERS was called as a witness on behalf of the plaintiff, in rebuttal, and said H. Rodgers being first duly sworn, testified as follows:

Direct Examination.

My name is H. Rodgers. I live at El Centro. I have lived there about seven years. I was inspector of the State Dairy Bureau, and have been County Health Officer there four years. I was there in the year 1914. I started on that position five years ago; I mean both positions; I held both positions at the same time. I know W. W. Skinner and where his dairy is. I have visited it. I visited his dairy prior to the time he was on that land. I know when he came to the ranch. After he came there, I could not say how frequently I visited the ranch, but it was very frequently, probably two or three days a week; he lived two or three miles from me. I am acquainted with the sanitary conditions during the early part of 1914, and the sanitary conditions on that ranch were good.

(Testimony of H. Rodgers.)

Cross-examination.

The conditions were not more sanitary after he put in his cement floor in the place where he milked his cows, than they were before. The milk-house is more sanitary if a cement or some kind of a hard floor that you can flush out with water than an ordinary board floor or ground. Where the dairy herd are kept on a floor, [253] kept under a shed, conditions are not as sanitary as in the open, where the sun strikes them and the place is cleaned out. I would not consider a yard sanitary where the cows were kept over night, where they were being milked in a small yard and where the yard was cleaned out only once a month. If it was cleaned out every two or three days the way Mr. Skinner's was—

Q. If Mr. Skinner testified he only cleaned his barn once a month, would you consider it sanitary?

A. I would not like to take Mr. Skinner's testimony, if he said so, because I know different. I did not issue any permit to Mr. Skinner to sell milk to customers. He did not have a permit to sell his milk. I do not know it to be the Los Angeles ordinance that they were required to procure a permit before they could ship to Los Angeles.

Testimony of Dr. R. W. Ridder, for Plaintiff (in Rebuttal).

Thereupon Dr. R. W. RIDDER was called as a witness for plaintiff, in rebuttal, and after having been first duly sworn, testified as follows.

Direct Examination.

By profession I am a veterinary surgeon and den-

(Testimony of Dr. R. W. Ridder.)

tist. I practiced in Holtville, Imperial County. I have practiced in Imperial County about four years. I am the Deputy County Inspector,—deputy county veterinarian. The largest portion of my practice is included in the dairy industry. I have taken two years in the Chicago Veterinary College, and one year in the McKillip Veterinary College, went to Wisconsin and passed the State Board examination at Madison, practiced two years after I finished school, came to California and passed the State Board [254] examination at Sacramento. It will be four years in January that I have practiced in California. I have come in contact with quite a number of the Sharples mechanical milkers in various parts of my community—probably eight or ten. I know the general principle on which they operate. I have read the instructions they send out with the machine and am familiar with them. This machine operated according to those instructions that I saw. They were not successful on account of the irritation—the constant suction producing irritation on the udder; it hurts the cow's teats; it sets up an inflammation—mammitis.

By Mr. SWING.—Q. Doctor, assume that a herd of dairy cows were being milked, one string by a milker and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared in the cows that milked by the mechanical milker, and that when that condition so appeared, the affected cows were taken off the milker and milked together with other cows being milked by

(Testimony of Dr. R. W. Ridder.)

hand, not being isolated, and that the milkers did not wash their hands between cows so milked, and the cows so affected got well, and the swollen quarters did not spread to a single other cow being milked by hand, what, in your opinion, would be the cause of the swollen quarters ?

A. In my opinion, it would be a local irritation.

Q. Assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the [255] machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted, and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about 30 days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of the milker and thereafter milked by hand, following which hand-milking the swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of

(Testimony of Dr. R. W. Ridder.)

that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked by hand; that the cows which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions and surroundings, with the one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while in those being milked by hand the existing swelling rapidly disappeared and did not reappear so long as they were milked by hand, what, in [256] your opinion, was the cause of the swollen quarter? A. Local irritation.

Q. Caused by what?

A. Caused by constant vacuum, or constant suction of the teat cup on the udder.

Q. Assuming the facts stated in my previous question, and further, that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine, and after thoroughly disinfecting the machine and the premises, began milking all of plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in

(Testimony of Dr. R. W. Ridder.)

a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form, which became so intense in the case of about 17 cows as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters; that of the sixty odd remaining cows of the herd [257] being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings, with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case or any similar

(Testimony of Dr. R. W. Ridder.)

case of swollen quarters in his herd, before beginning the use of the milker, and there has been no case of swollen quarters in his herd since the milking machine quit, what, in your opinion, was the cause of the production of additional swollen quarters?

A. What was the primary cause?

Q. The primary cause.

A. My impression is it was simply an irritation—local irritation.

Q. Produced by what?

A. Produced by—well, the milking machine; if it was not the milking machine the hands would produce it, the same as the milking machine.

Q. Would you say the cows had, under this statement, infectious mammitis, or not?

A. If they did, it was secondary, due to some primary cause.

Cross-examination.

If abscesses appeared in the cows referred to, belonging [258] to plaintiff, and pus ran out of the teats, and there was a complete sloughing away of the whole quarter, I would certainly say that there would be an infection present.

Q. So that if you were to see a cow, if you had seen plaintiff's cows, and had found them in that condition, where a number of quarters on the cows were swollen, and numerous cases where abscesses were running out of the teats, and some quarters were abscessed and running pus out, you would think they were infected, would you not, with infectious mammitis?

(Testimony of Dr. R. W. Ridder.)

A. You would have to have infection in order to have pus. Such condition certainly could result from a mere traumatic condition. The pus producing organisms are present in absolutely every case, in my opinion, of normal conditions of the udder, and until the udder is placed in a susceptible condition where the germs will enter abrasions through irritation, the udder has sufficient strength to resist infection until there is an irritation. It may be possible for a pathogenic micrococcus to attack a perfectly healthy tissue under a violent condition; but there must, in my opinion, be some infectious germ before it will result in the form of pus and the sloughing away of the quarters of the cow. I never made any bacteriological test of the milk of Mr. Skinner's cows, nor did I ever examine his cows.

Q. If there was found, from a bacteriological test of Mr. Skinner's cows, yellow micrococcus, or what is otherwise known as staphylococcus, and the physical appearance of the cow was a general depressed condition, she stood [259] about, seemed to have no life, appeared to be in a sick condition, and the udders were swollen and in many cases pus was running from the teats, and the quarters sloughed away, would you, then, in your opinion, say that cow was infected with noninfectious or infectious mammitis, finding the particular staphylococcus? Just answer my question whether you would diagnose the case that way.

(Testimony of Dr. R. W. Ridder.)

A. It would be infectious, but there is an issue between infectious diseases and contagious diseases. *Staphylococci* is not classed as contagious in no bacteriological book. It is present in every cow; it can be transmitted the same as any other disease, and if one take the germ from one cow and put it on another cow near the entrance of the hole, that would probably transfer it from one cow to another, but it must set up an irritation. It is contagious in the sense, if you touch it it may contaminate by inoculation. It would probably be just the same as a patient drinking out of a glass from which a tubercular or typhoid fever patient has just drunk—the healthy person might become inoculated with the disease germ by inoculation. The other is a contagious germ you are speaking of, typhoid, where they could take the micro or staphylo, or any of the *streptaccicci* without producing any bad features, but the micro is a contagious and more virulent germ than the *staphylococcus*. It is a fact that infection in the ordinary medical sense means the growth in the tissue, while contagious means the manner in which infection is transmitted; so that a germ may be infectious, and at the same time if it is transmitted from one cow to another one would say that it would be contagious also; a *staphylococci* [260] is both contagious, because it can be transferred from one cow to the other by inoculation, and it is infectious because when it gets into the cow's udder, it may result in forming pus. *Staphylococci* is not contagious, according to the bacteriological book where it says the micro, staphylo or strepto-

(Testimony of Dr. R. W. Ridder.)

coccus is contagious. By inoculation, it may be transferred from one cow to another where you have an abrasion. As to the entry through the teat duct, under normal conditions, there is no abrasion, and the germ, two to one would not produce any disease. It is there in every case. It may be possible that it would take a perfectly normal tissue and thus infect that tissue, but a contagious disease would enter a normal tissue and produce a disease where noncontagious diseases would not.

Testimony of Dr. V. E. Cram, for Plaintiff (In Rebuttal).

Thereupon, Dr. V. E. CRAM was called as a witness in behalf of the plaintiff in rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

I am a veterinary surgeon, practicing at El Centro, California. I have practiced six years. I held the office of Deputy County Veterinarian. I graduated from the State College of Colorado. I have had occasion, to a very limited extent, to observe the effect of the operation of the Sharples mechanical milker upon dairy cows at Mr. Skinner's ranch in Imperial Valley. I was called there about the last of June, 1914; I found a diseased condition of the udders of several cows, with the presence of pus in these udders; there were about 17 cows; those were bad; I made an examination of the cows, and the history of the [261] cows. After going over the cows thoroughly, under the process of elimination, and trying

(Testimony of Dr. V. E. Cram.)

to find out what was causing it, I decided that the primary cause of the condition of the cows I saw there was due to the milking machine.

Cross-examination.

I found pus in the teats of the cows; that indicates the presence of a germ. There are two or three kinds of germs—non-infectious and infectious germs. The presence of pus indicates the presence of a germ; this germ was not an infectious germ; it was not a contagious germ. I did not make any bacteriological test of the germs from Skinner's cows. As to whether they were not staphylococci, streptococci or micrococci, which by the better authorities are held to be infectious, I presumed it was staphylococcus; I presumed it was, my opinion is a presumption, and I made no bacteriological or chemical analysis.

Mr. PARKE.—We move to strike out the answers of the witness as to the causes here; it appears as a mere presumption on his part.

The COURT.—Motion denied.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 59.

And said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error.

Q. Do you mean to say that staphylococci or micrococci is not an infectious or contagious germ?

A. Well, there are several definitions of infection and contagion. Every authority describes them probably as a little different. You have your books before you. Will [262] you give me your definition of infectious germ? I do not think they are

(Testimony of Dr. V. E. Cram.)

infectious. I think the condition in Mr. Skinner's herd was caused by the bacteria in the udders; and that bacteria, by means of inoculation, may be transferred from one cow to another, just the same as you could carry any other kind of a germ. If the cow is affected with ordinary garget, or a traumatic condition, and there is present no infectious germ, it is possible to cure the cow by treating her properly. I do not know whether Mr. Skinner gave the cows any treatment or not. I prescribed the treatment. The treatment had practically no effect upon the cows. If it were a traumatic condition, the prescription that I gave would not have cured the cows —a different treatment for traumatic. I will have to qualify the answer. I didn't mean a different treatment for traumatic. The different treatment is for the severity of the case; after they get to a certain stage of development there is practically none. I did not tell Mr. Skinner that I thought that his was contagious mammitis. The treatment I prescribed was for external and internal applications. It is customary to treat a cow internally for an ordinary traumatic condition, according to the severity of the condition. If there is pus present in the udder, then you treat her internally; that is the sort of treatment.

Redirect Examination.

It takes the pus inside of 24 hours to appear after there has been an injury.

Testimony of Dr. C. A. Daudy, for Plaintiff (In Rebuttal).

Thereupon, Dr. C. A. DAUDY was called as a witness in behalf of the plaintiff, in rebuttal, and having been first duly sworn, testified as follows: [263]

Direct Examination.

I live at Brawley, Imperial Valley. I have lived in Imperial Valley about two years. I have been practicing as a veterinarian since 1913. I was graduated from the Chicago Veterinary College. I have been County Livestock Inspector, in Imperial County, for several years—I could not tell you how many; I believe it was called County veterinarian at one time. My practice includes the treatment of dairy cows. I have had occasion, in a little way, to observe the operation of a Sharples mechanical milker; I think it was at Mr. Boart's ranch. As to whether I understand the general principle upon which it operates, well, in a rough way, I do. Assuming that the water which was used at the Skinner place for washing the milker's hands, and also for washing the teat cups which are used in the Sharples mechanical milker to milk his cows, and part of the cows were being milked by the milker and part were being milked by hand, and some of the cows took down with swollen quarters, if the water was the source of the infection and trouble there would not be any difference in my opinion in the number of cows that were taken down being milked by hand, as compared with the number of cows taken down being milked by the milker.

(Testimony of Dr. C. A. Daudy.)

Q. Do you understand this pulsator, and that by turning this little faucet here you can turn on more pressure or less according to the different cow which is being milked, and in that way an adjustment is made to each cow—you understand that, do you?

A. I have been told that is the case, yes, sir. There is very apt to be a difference in the various quarters in the [264] same udder in pliability and in hardness or softness. If a mechanical milker was adjusted for the purpose of getting milk out of the teat which was hardest to milk, in my opinion, the teat was easier to be milked, would be milked first, probably, and be under a greater strain. As to the presence of pus producing bacteria, and of micrococcus, well, we are told that they are everywhere. As to whether in my opinion micrococcus is an infectious germ—whether it is so considered by authorities—why, I think so. In my opinion, I don't think it will attack healthy tissue or membrane.

Q. What, in your opinion, must proceed an invasion by this bacteria?

A. Well, there would have to be a favorable condition for the development of—

Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharples mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked by the mechanical milker, and that when the condition so appeared, the affected cows were taken off the milker and milked together with other cows then be-

(Testimony of Dr. C. A. Daudy.)

ing milked by hand, not being isolated, and that the milkers did not wash their hands between cows, and that the cows being milked by hand got well and the swollen quarters did not spread to a single other cow being milked by hand; what would you say as to what was the cause of the swollen quarter?

Mr. PARKE.—We object to the question as assuming only a partial statement of the uncontradicted facts as presented by the evidence, it appearing clearly from the [265] evidence that there was present in the milk from Skinner's cows certain germs designated as staphylococci, and it would be unfair to ask the witness the cause of such condition without setting forth that condition, and further, nothing is said about the manner in which the milking machine was operated and—

The COURT.—Well, I will overrule the objection.

Mr. PARKE.—Note an exception.

EXCEPTION NUMBER 60.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I would believe the teats there were being bruised by the milker. I would not say, under the conditions stated in the question, that the swollen quarter was an infectious condition. I think that the cup on this teat has bruised the quarter. The reason I think so was because there was no spreading of the disease there originally, and as soon as they took the teat cup off and went to milking these cows by hand, why, the trouble disappeared. The primary cause, in my opinion, of the condition stated was the

(Testimony of Dr. C. A. Daudy.)

bruising of the teat cup—of the teat by the teat cup.

Cross-examination.

If the cow's quarters became diseased near the point where they abscessed, I would say there was an infection of bacteria there.

Q. The condition might have arisen from an injury of most any kind, might it not; in other words, if a cow got kicked in the bag and then there should be an invasion of some infectious germ, such as staphylococci, streptococci, or [266] generated pus, that might be transmitted to all those cows in the herd by inoculation.

A. Well, that would have to be manual inoculation; you would have to punch it in there.

Q. Well, if it got on the outside of the teat?

A. I am not sure whether that is possible or not. It is possible to carry infectious germs from one cow to another by hand-milking, and probably that is usually the way infectious mammitis spreads among cows. I never made any examination of Mr. Skinner's cows; I never treated them. I never made any bacteriological examination of the milk. I do not know whether they had infectious mammitis or not. I never treated a herd which was afflicted with infectious mammitis. I don't know what caused the injury at Mr. Skinner's place; I never was at his place.

Deposition of A. G. McCulloch, for Plaintiff (In Rebuttal).

Thereupon the deposition of A. G. McCULLOCH, a witness produced on behalf of the plaintiff, was received and read in evidence in this cause on behalf of the plaintiff in rebuttal, as follows:

Direct Examination.

My name is A. G. McCulloch, I live at West Moreland. I have been in Imperial Valley four years. I have handled dairy cows all my life with the exception of seven years. I have handled dairy cows all the time I have been in Imperial Valley. I am pretty well acquainted with the common diseases of cows. I know what mammitis is; it is an inflammation of the mammary gland. I have operated a Sharples mechanical milker, and have seen it in operation by others. I know the general principles on which it is operated. I have seen other mechanical milkers besides [267] the Sharples operated. My experience with the Sharples mechanical milker has been in Imperial Valley. I have milked both by hand and by mechanical milker. I operated a milker in the neighborhood of two months.

I know the plaintiff W. W. Skinner. I have never been at his place. Besides the mechanical milker which I operated, I saw J. J. Miller's Sharples mechanical milker operated. The other mechanical milkers that I have seen operated besides the Sharples were the Hinman and *and* D. L. K.

(Deposition of A. G. McCulloch.)

Q. What are some of the causes of mammitis, if you can say?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid therefor.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 61.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. Any injury inflicted upon the cow's udder will cause an inflammation. I know the general difference between infectious mammitis and noninfectious mammitis.

Q. I will ask you whether in your opinion noninfectious mammitis can be caused by the use of a Sharples mechanical milker in milking cows?

Mr. PARKE.—We object to the question as calling for a conclusion, no proper foundation having been laid, incompetent, irrelevant and immaterial, and the circumstances and conditions under which the operation of the machine might be made not being stated in the question. [268]

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 62.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. It can. Before starting to operate with the

(Deposition of A. G. McCulloch.)

Sharples mechanical milker I referred to a while ago, I had been instructed in the operation thereof by some representative of the Sharples Separator Company. I had been furnished with printed instructions, and I familiarized myself with those instructions.

Q. Did you follow them in operating the milker?

Mr. PARKE.—We object to the question as calling for a conclusion.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 63.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. I did. After I started to use a Sharples mechanical milker, no representative of the company ever called to see how I was getting along until after the trouble showed up; then, some one did; and it was Munson. The manner in which I operated the milker was discussed with Munson; he said as far as his knowledge of the milker went, it was operated mechanically perfect; he did not criticise in any way the manner I had operated it; he said it was absolutely perfect in management and operation. The effect that I noticed on the cows following the use of the Sharples mechanical milker after milking the cows, was udder trouble; [269] it was consequently the drying up of the cows. Prior to the time the mechanical milker was put on those cows, I had been milking them by hand for two years or better,

(Deposition of A. G. McCulloch.)

I don't know exactly. We had no udder trouble with those cows before I put a mechanical milker on them. There was nothing except when a cow would become injured in some way, and that was only—you could confine it to maybe to one or two cases. It was where the cow would get stepped on that would generally leave a skinned spot on the udder, or on the teat. Aside from such injuries to the udder, there had been no udder trouble. Twenty-three out of forty-seven of my cows developed udder trouble after commencing to milk them with a mechanical milker; udder trouble developed in one or more quarters; I gave them no other treatment than taking the machine off the cows, and milking them by hand; the trouble disappeared. I always put the machine back on them after the swelling had disappeared and it would return in a shorter period of time than before; I always have to take it off in order to heal them up. I do not remember whether I ever had the machine back on a cow more than the second time or not. After the second time the cows were not returned to normal. You could always see the effect of the milker on the cow after she had been once injured. These cases of swollen quarters which I have referred to, which developed while I was using the mechanical milker were noncontagious and noninfectious.

Q. I will ask you whether in your opinion the Sharples mechanical milker can be operated upon dairy cows in Imperial Valley without seriously injuring some of them. [270]

(Deposition of A. G. McCulloch.)

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 64.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. No, it cannot.

Q. What in your opinion would be the effect upon a string of dairy cows if milked any considerable length of time with a Sharples mechanical milker even though all the instructions furnished by the company are strictly followed?

Mr. PARKE.—We object to the question as calling for the expert opinion of the witness, presuming a state of facts not proven in this case, incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 65.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. It would eventually kill the cows if persisted in. It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine if persisted in.

Q. Assuming that the plaintiff in this case, W.

(Deposition of A. G. McCulloch.)

W. Skinner, had on his ranch in Imperial Valley a herd of healthy dairy cows, and that in February, 1914, he began milking the same with a Sharples mechanical milker, and in about thirty days [271] after he began milking them with a mechanical milker they began developing swollen quarters, and that as fast as he noticed a cow with swollen quarters took it off the machine and milked it by hand, and without any other treatment the cow returned to normal, and that when she was put back on the milker again she shortly developed one or more swollen quarters again and when taken off she again soon returned to normal, and that within a period of less than one year he had had approximately half of his cows at one time or another affected with the swollen quarters, what in your opinion would be the cause of the appearance of swollen quarters in his herd, assuming that the mechanical milker was operated strictly according to the instructions of the Sharples Separator Company, what in your opinion would be the cause of the swollen quarters?

Mr. PARKE.—We object to the question as calling for the expert opinion of the witness, and presumes a state of facts not proven in this case.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.

EXCEPTION NUMBER 66.

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

A. It would be the Sharples Milking machine.

(Deposition of A. G. McCulloch.)

Cross-examination.

If I had a herd of dairy cows in Imperial Valley under conditions similar to those under which Skinner's were kept, and while being milked by hand twenty per cent of the cows should have swollen quarters, the cause of that in my [272] opinion, will be pretty apt to be infectious garget. It could not just as well result from abuse from the manner in which the cows were milked. As to whether it is impossible for mammitis to develop other than by the use of a machine, when a milker gets so abusive that he hurts the cow he is not milking. In my knowledge, cows have had caked bags when milked by hand, but not from milking—from injury, being kicked or struck in some way.

Q. Isn't it possible for cows to have a caked bag if she isn't milked properly and milk is left standing in her bag for a considerable period of time?

A. If she isn't milked at all.

Q. Isn't it possible for mammitis to arise under those conditions?

A. Not from milking; if she is not milked at all, it might be possible for the cow's udder to become swollen. Infectious mammitis is caused by stephnaecoccus and streppicoccus bacillus into the end teat and from there up into the mammary glands. Probably the quickest way to distinguish infectious mammitis from noninfectious mammitis by the outside appearance of the bag or udders of the cow is that infectious mammitis will spread from one quarter to another. It can be determined from the appear-

(Deposition of A. G. McCulloch.)

ance of the quarter. The infectious mammitis does not have the same feeling as the noninfectious.

Q. There is only one definite way to determine it, and that is by having a bacteriological test made of the milk, isn't it?

A. No. A contagious mammitis will spread and noncontagious will not spread. It did not spread among my herd. [273] A great many of my cows had swollen quarters, one after another, when the machine was on them, and in taking the machine off they stopped, and in milking them I tested them thoroughly as to whether it would spread or not, and it did not spread in any case, and also the discharge from the teat. It is impossible to mistake contagious from noncontagious. We get the discharge right in the start. It is possible for contagious garget to result into an abscess and pus running out of the udder to become contagious and infectious. As to whether any of my cows developed any abscess or anything of that kind, I answer yes; one cow developed an abscess, but it never reached the contagious garget state. I watched a mechanical milker operated in a place outside of Imperial Valley,—in Tulare County; at that time it had been operated only a short time; I do not recollect the date; two weeks or something like that; that machine was the B. L. K. I never saw a Sharples machine operated anywhere else. If the Sharples machines are being operated in other places than the Imperial Valley without injury to cows, I say it could not be operated here in Imperial Valley, because they have all failed;

(Deposition of A. G. McCulloch.)

if they have not handled it properly, it is because the company does not know how—they have sent their experts down here. If these people that have handled Sharples machines have not strictly followed instructions, it is the company's fault. I personally know that the company sent a man to C. F. Boarts. I do not remember exactly how long the man stayed there—it was a week or some such a matter.

Q. You don't know whether Mr. Skinner operated his machine [274] in accordance with instructions?

A. I never was down there; I don't know whether any of the other people here who gave up and abandoned the use of the Sharples machine followed instructions or not.

Q. You don't know whether Mr. Skinner's cows were infected with infectious mammitis or local mammitis, do you?

A. I never saw his cows. My machine worked all right from a mechanical standpoint; it was mechanically perfect; other than the injury which I claim it did to the cows, it was entirely satisfactory; and with the possible exception of the resultant injuries which I alleged happened to my cows, it did all that I expected of the machine. The operation of any mechanical milking machine cannot cause infectious mammitis.

Thereupon, a stipulation was entered into by and between counsel relative to various depositions which have been taken by the respective parties in the

above-entitled action, which said stipulation was and is as follows, to wit:

The COURT.—State the stipulation.

Mr. PARKE.—It is stipulated that the depositions of Hans J. Hansen, M. S. Autry, James Willis, Edward L. Stam and Gus Harris, all residents of Salt River Valley, near Phoenix, Arizona, show that these various witnesses have milked cows by hand, and thereafter used a Sharples Milking Machine over various periods of time, and upwards of three years, and that they have not had any more trouble with their cattle after the use of the machine than while milking by hand; that they received as much, and in some cases more milk by the use of the machine than when milking [275] by hand; and that, in their opinion, from their observation and use of the machine when properly used, will not cause udder trouble among the cattle upon which a Sharples milking machine is used.

Mr. SWING.—And our part of the stipulation is that witnesses J. H. Eastman, J. W. Finley, H. C. King, J. J. Miller and H. O. Wood, are dairymen of Imperial Valley—

The COURT.—And they testified like this other witness McCullouch?

Mr. SWING.—Yes, sir—dairymen of the Imperial Valley and have used the milker in accordance with instructions given them, and they have been unable to operate it, or make it operate without injuring their cows, and it has also resulted in shortage in the milk, all during the year 1914.

Mr. PARKE.—For how long a period in each case?

Mr. SWING.—I mean they used it for a year.

Mr. PARKE.—For a period from two weeks to a year.

Mr. SWING.—All right.

Mr. PARKE.—I agree to the stipulation.

The COURT.—Then it is stipulated that those witnesses will so testify as in their depositions, and the reading of the depositions be waived, and the filing of the depositions will not be necessary.

Mr. PARKE.—The defendant offered in evidence as a part of the cross-examination of Mr. Skinner the bill of particulars furnished to the defendant by Mr. Skinner, and I think the Court said the bill of particulars might be introduced in evidence and marked.

The COURT.—It was marked as an exhibit.

Mr. PARKE.—Yes.

The CLERK.—I think it is Number 2, Defendant's Number 2. [276]

Whereupon, Mr. Parke read to the jury the following paragraphs from plaintiff's bill of particulars:

"7. All four units were in use before any of plaintiff's cows were seriously injured. The four units were used indiscriminately, so that it is impossible for plaintiff to itemize the injury caused by the original three units as distinguished from that caused by the fourth unit purchased by plaintiff after the installation of the machine. No record was kept of

the amount of milk each cow gave.

"19. No information can be given as called for by Demand No. 19, owing to the fact that no record was kept of the effect of the use of the three units purchased from defendant as contradistinguished from the effect of the fourth unit subsequently purchased but will say that approximately twenty of plaintiff's cows were ruined from the use of the four units between the 25th day of June, 1914, and the 7th day of July, 1914. The last half of Demand No. 19 appears to be repetition of Demand No. 17 and the answer thereto has hereinbefore been given.

"23. Herewith is given a list by the month of the pounds of butter fat delivered to Imperial Valley Creamery and Delta Creamery during the year 1914, with the price per pound for butter fat for each month. Plaintiff has not in his possession at the present time a record of butter fat given for the preceding year but knows that the amount delivered by him to the creameries was less in the year 1914 and 1915 than in 1913.

| Months | Pounds of Butter Fat. | Price per Pound. |
|-----------|-----------------------|------------------|
| January | 1619.77 | |
| February | 1493.01 | |
| March | 1925.4 | 22¢ |
| April | 1975.3 | 25¢ |
| May | 1834.4 | 24¢ |
| June | 1376.9 | 26¢ |
| July | 1732. | 25¢ |
| August | 1683.1 | 25½¢ |
| September | 1585.1 | 27½¢ |

| | | |
|----------|--------|------|
| October | 1611.3 | 31¢ |
| November | 1481.8 | 34½¢ |
| December | 1468.9 | 30¢ |

[277]

The following is paragraph 13 of the bill of particulars, as furnished by the plaintiff, at defendant's request.

"13. That on or about the 20th day of October, 1914, F. L. Briggs made the representations referred to in the 13th demand. His statements and warranties were both oral and in writing. That a number of his oral statements are substantially set out in paragraph 12 of plaintiff's amended complaint. The number that was not written was as follows:

October 20, 1914.

The Sharples Separator Company do hereby agree to furnish W. W. Skinner one Mechanical Milker Operator for two months more or less, Mr. Skinner to pay him a salary of \$75.00 per month.

It is further understood that Sharples Separator Company are to pay Mr. Skinner for any damage done to his cows by the use of the machine while in the hands of their operator.

It is also understood the Sharples Separator Company are to pay Mr. Skinner the amount of the operator's salary providing the machines are not a success.

SHARPLES SEPARATOR COMPANY,
By F. L. BRIGGS,
W. W. SKINNER."

H. C. KING,

Witness. [278]

Mr. PARKE.—It is further stipulated that Mr. Skinner was recalled to the witness-stand and testified that \$480 was the reasonable market value which he placed upon the pasture of the cows injured and which were later sold as beef cows—from the time of their injury until they were sold.

Mr. SWING.—He testified it was the reasonable value.

Mr. PARKE.—The reasonable value which he placed upon it.

Here the testimony was closed, and the foregoing constituted and was all of the evidence offered and received upon the trial of the above-entitled action, and no other, different or additional evidence or testimony of any character was received by or placed before said Court and jury, in addition to that hereinabove in this bill of exceptions set forth.

Thereupon, counsel for the respective parties argued the cause to the jury; and said argument having been completed, the Court, of its own motion, instructed the jury as follows:

The COURT.—Gentlemen of the jury, it is my duty under the law to state to you what the law is that should guide you in returning a verdict. If I state it wrongfully the parties have an opportunity of appealing to a higher court. It is presumed that I know the law, however violent that presumption may be, but whatever I state to you is the *law you* are bound by it.

It is your duty to determine the facts of the case. That is your trouble, not mine. It is very difficult sometimes to determine what the law is. I have

found it is [279]. easier to determine what the facts are than what the law is. But you must take the law as I give it to you and apply it to the evidence that has been introduced and determine the facts. You must decide the case according to the evidence that has been given, and the stipulations of the attorneys must be regarded as evidence, and determine the case solely upon such evidence. The arguments of the counsel in the case is to aid you in determining what the facts are and when you determine what the facts are you must return your verdict accordingly. That is your exclusive privilege, and you must not assume that anything I say intimates to you how you shall decide the facts. I may have my opinions and I might say something that indicates to you what my opinion is but you are not bound by it.

In regard to the witnesses, you are the exclusive judges of whether they testified to the truth and what weight you shall give to what they say. You must determine what they say and what weight you shall give to what they say from their manner upon the witness-stand, their conduct, the reasonableness of their story and the interest they have in the controversy. The fact that the plaintiff is a man, a citizen of our State, and the defendant is a nonresident corporation, should not weigh with you, because in the eyes of the law everybody stands before the Court equal. The law is blind as to parties.

The law gives the parties a right to request the Court to give you certain instructions and if those instructions are the law it is my duty to give those instructions to you. Probably if I had my way about

it I would say to you: "Go off and decide this case," because you know as [280] much about it as I do, but I am required, as I said before, to give you certain instructions.

This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint, they are no more a party to this action, because as to them the action has been dismissed.

The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some

of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the milker was started his cows [281] began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow him damages in a sum which would be a fair compensation for the loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

The word "fair" used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than "full" or "complete" compensation; it is used rather in the sense of "just."

The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said The Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Sep-

rator Company during the negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed.

You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company [282] which is to be considered by you is the warranty contained in the original order, being Plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury room, gentlemen, or any other exhibit you desire.

You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.

The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the proximate result of the

operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the defendant company.

If you believe from all the evidence that the milking machine, while being properly operated, was the cause of the injury to plaintiff's cows, then you are instructed that the [283] defendant Sharples Separator Company can be held liable only for the damages resulting from the use of the three units purchased from it, and that the defendant Sharples Separator Company is not liable in damages for the use of the fourth unit purchased by plaintiff through Edgar Brothers.

Plaintiff claims damages in the sum of \$1,007, being the purchase price and cost of installation of the milking machine purchased from the defendant Sharples Separator Company. It appears from the evidence that of said sum of \$1007, only \$461.42 was paid by the plaintiff to the defendant Sharples Separator Company for the milking machine containing the three units, and that the balance of \$1007 was for a gasoline engine, for the lumber to build his stanchions, and for sand and gravel used by the plaintiff in making a cement floor for his milking shed. If your verdict in this case should be for the plaintiff and against the Sharples Separator Company, you are instructed that in arriving at the amount of

damages to be allowed to plaintiff for moneys expended in the purchase and installation of the machine you should deduct from the said sum of \$1007 the reasonable value to the plaintiff of the milking machine, of the gasoline engine so purchased, of the stanchions so built, and of the cement floor so installed by the plaintiff.

If you believe from all the evidence that the diseased condition of the plaintiff's cows was not the result of an infectious disease but of a local injury or traumatic condition, and you believe further from the evidence that any and all permanent injury to said cows so affected could have been prevented by prompt, careful and proper treatment of said cows by the plaintiff, and said plaintiff failed and [284] neglected to give to said cows so diseased such prompt, proper and careful treatment, then you are instructed that the defendant Sharples Separator Company is not liable for damage resulting from such neglect of plaintiff.

If you believe from the evidence that plaintiff's cows had infectious mammitis, or other infectious disease of the udder, and that plaintiff knew of such condition, the plaintiff should not have used said machine upon said cows if he knew that it would spread such disease, and if the defendant, through its agents, desired to use such machine upon said cows, it was the duty of the plaintiff to advise the defendant of such diseased condition, if defendant did not know of it.

The burden is upon the plaintiff to show by a preponderance of the evidence that the injury to his

cows was caused by the use of the milking machine furnished by defendant while the same was being operated in strict accordance with the instructions given plaintiff by the defendant Sharples Separator Company, and if you find that the diseased condition of plaintiff's cows was the result of improper operation of the machine by the plaintiff, or of infectious mammitis or other infectious disease not the direct result of said machine and the proper operation thereof, then your verdict must be for the defendant.

If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled [285] to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine.

In estimating the value of the cows that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows.

You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after her loss, and I give you these rules to govern you in allowing the damages:

1st. Where a cow died, you shall allow for the use

of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

2d. Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no further service as a milk cow and until she was well enough to be disposed of for beef; then allow the difference between the value of the cow for beef.

3d. Where a cow was not destroyed as a milk cow but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow [286] before her injury, and the value of the cow as a milk cow after her injury.

4th. Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter fat during the time she was injured and did not give her normal amount of milk.

5th. If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.

In regard to damages, I instruct you that the plaintiff sets out certain damages which plaintiff claims he is entitled to. He cannot recover any different or other damages than that specified in the amended complaint and the amendment thereto. These two papers you can have with you when you consult, if you so desire.

When you retire to your jury-room, gentlemen, to consider your verdict, the first thing you should do is to elect a foreman, and when you shall have determined upon your verdict, let the foreman sign it and return it to court. You shall all agree upon the verdict before you can return one. It is the law in the State of California, that *that* less than twelve jurors may return a verdict, but that is not so in this court, you must all concur in the verdict.

And be it further remembered that the foregoing [287] was and is the whole of the charge of said Court to said jury, and that no other, further, different or additional instructions were given by said Court to said jury.

And be it further remembered that heretofore, and during the trial of said cause, said defendant, Sharples Separator Company, a corporation, through its counsel, duly presented within due and proper time to said court certain instructions asked by said last named defendant to be given to the jury in said cause, and said instructions were received by said court in time; and in as much as the rulings of said court upon said requested instructions, and the exceptions of said defendant corporation thereto form part and portion of the exceptions relied upon

by said defendant herein, said defendant, said Sharples Separator Company, a corporation, here and now sets out said requested instructions, together with the ruling of the court thereon and the exceptions taken thereto, and each and all of said rulings and exceptions were made and taken in the presence of said jury, while the jury was still at the bar of said court, and before said jury retired to deliberate upon its verdict. Said instructions requested by said defendant, Sharples Separor Company, a corporation, together with the ruling of said court thereon, and the said exceptions taken thereto, as hereinabove set forth, were as follows, to wit:

**Instructions Requested by Defendant Sharples
Separator Company, a Corporation.**

DEFENDANT'S REQUEST NO. II.

If you believe from all the evidence that the plaintiff's cows were injured by the use of the milking [288] machine furnished by the defendant Sharples Separator Company, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiffs' damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to recover anything additional for care or keep of said cows, or for loss of butter fat therefrom.

Which said instruction No. II said Court then and there refused to give said jury, and in failing so to

instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant Sharples Separator Company, a Corporation, then and there duly excepted.

EXCEPTION NUMBER 66.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. III.

You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat.

Which said Instruction No. III, said Court then and there refused to give to said jury, and in failing so to instruct and charge the jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said *instruction said* jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 67. [289]

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. IV.

There is no evidence before the Court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor.

Which said Instruction No. IV said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a cor-

poration, then and there duly excepted.

EXCEPTION NUMBER 68.

DEFENDANT'S REQUEST NO. VII.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

If from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part, or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant Sharples Separator Company cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition.

Which said Instruction No. VII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, [290] Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 69.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. IX.

If you believe from all the evidence, that plaintiff's cows had infectious mammitis, or other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant

Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased.

Which said Instruction No. IX, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 70.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XI.

If you believe, from all the evidence, that the diseased condition of plaintiff's cows which resulted in the injury complained of by him, was a traumatic, or noninfectious disease of the udder, known as ordinary garget, and that the permanent injury to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said [291] cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for an injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff.

Which said Instruction No. XI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and in said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company,

a corporation then and there duly excepted.

EXCEPTION NUMBER 71.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XII.

You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company.

Which said Instruction No. XII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 72.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

[292]

DEFENDANT'S REQUEST NO. XIV.

If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper, and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant Sharples Separator Company is not liable.

Which said Instruction No. XIV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the

said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 73.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XV.

If you believe, from all the evidence, that the death of the three cows, and the diseased condition of the udders of the other twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the defendant in this case is not liable to the plaintiff for such damages.

Which said Instruction No. XV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 74. [293]

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

DEFENDANT'S REQUEST NO. XVI.

If you believe, from all the evidence, that the diseased condition of plaintiff's cows resulted from the negligent or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage.

Which said Instruction No. XVI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court

misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 75.

And said defendant, Sharples Separator Company, a corporation, now assigns said ruling as error.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court, to said jury which reads as follows, to wit:

This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and [294] represented that if the same was operated according to its instructions' it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as al-

leged in the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are *to move* a party to this action, because as to them the action has been dismissed.

EXCEPTION NUMBER 76.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said court to said jury which reads as follows, to wit:

The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the milker was started [295] his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow him damages in a sum which would be a fair compensation for the loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and per-

mitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

The word "fair" used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than "full" or "complete" compensation; it is used rather in the sense of "just."

EXCEPTION NUMBER 77.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly executed to all that part of the charge of said Court to said jury which reads as follows, to wit:

The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said The Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed [296] matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharpless mechanical milker, and what it will do, and it is for you to decide from

all the evidence whether the warranty has been performed.

EXCEPTION NUMBER 78.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

Also that the detriment caused by the breach of warranty of the fitness of an article of personal property [297] for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.

EXCEPTION NUMBER 79.

And said defendant, said Sharples Separator Com-

pany, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the proximate result of the operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the defendant company.

EXCEPTION NUMBER 80.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and [298] there duly excepted to all that part of the charge of said court to said jury which reads as follows, to wit:

If you believe from all the evidence that plaintiff's cows were injured by the use of the milking

machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine.

EXCEPTION NUMBER 81.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that said defendant, said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

In estimating the value of the cows that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows.

EXCEPTION NUMBER 82.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said court. And be it further remembered that said defendant [299] said Sharples Separator Company, a corporation, then and there duly excepted to all that part of the charge of said Court to said jury which reads as follows, to wit:

You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

1st: Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

2d: Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no further service as a milk cow and until she was well enough to be disposed of for beef; then allow the difference between the value of the cow before she was injured and the value of the cow for beef.

3d: Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow before her injury, and the value of the cow as a milk cow after her injury.

4th: Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter [300] fat during the time she was injured and did not give her normal amount of milk.

5th: If the machine did not produce as much milk when being used as if said cow had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.

EXCEPTION NUMBER 83.

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

The COURT.—An exception will be entered to each of the instructions given by the Court, and to each of the instructions requested by the respective parties and refused.

Swear the bailiff.

And be it further remembered that each and all of the foregoing rulings and exceptions made and taken during the progress of said trial, were made and taken in the presence of said jury, while said jury was still at the bar of said Court, and before said jury retired to deliberate upon its verdict; and that after said bailiff had been duly sworn as ordered by said Court, said jury then retired in charge of such sworn officer to consider their verdict, and thereafter came into court and gave, made, rendered and returned the following verdict, to wit: [301]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. CIVIL 413.

W. W. SKINNER,

Plaintiff,

vs.

SHARPLES SEPARATOR COMPANY,

Defendant.

Verdict.

“We, the jury in the above-entitled cause, find in favor of the plaintiff in the sum of \$3,763.92.

Los Angeles, California, October 13, 1916.

L. T. BRADFORD,

Foreman.”

And to said verdict said defendant, said Sharples Separator Company, a corporation, then and there duly excepted.

EXCEPTION NUMBER 84.

And said defendant, said Sharples Separator Company, a corporation, now assigns said verdict as error. [302]

**ASSIGNMENT AND SPECIFICATION OF
ERRORS.**

And be it further remembered that the above-named defendant, said Sharples Separator Company, a corporation, now assigns and specifies the following errors occurring at the trial of said action, to wit:

I.

Particulars wherein the evidence is insufficient to justify the verdict.

(a). There is no evidence upon which the jury could find that the milking machine furnished by the defendant caused the injury shown to have been sustained by plaintiff's cows.

(b). The plaintiff failed to introduce any evidence from which the jury might determine the amount of injury or loss, if any, that was sustained by plaintiff, from the use of the three units purchased from the defendant, and the one unit purchased from Edgar Brothers Company.

(c). The preponderance of the evidence shows that the injury actually resulting to plaintiff's cows, and the consequent loss of milk, if any, was due to the invasion of an infectious disease, not produced or caused by the operation of the machine furnished by the defendants.

(d). The preponderance of the evidence shows that the plaintiff's cows were affected with an infectious disease, and that such infectious disease was not and could not have been caused by the operation of the milking machine furnished by the defendant.

(e). The evidence does not show that the plaintiff was damaged in the amount found by the jury.

(f). The preponderance of the evidence shows that a [303] large part of the damage sustained by the plaintiff's cattle resulted from a lack of proper care and treatment thereof by the plaintiff and that had said plaintiff treated said cows in a proper and careful manner, a large part of the in-

jury sustained by said cattle would have been prevented.

(g). The preponderance of the evidence shows that the defendant committed no breach of warranty, and that whatever damage was suffered by the plaintiff was the result of other causes than the operation of the milking machine furnished by the defendant.

II.

Particulars in which said verdict is contrary to and against the law and the evidence.

(a). The verdict is contrary to and against the law and the evidence in that the preponderance of the evidence shows that the damage sustained by plaintiff's cattle resulted from the invasion into the udders of said cattle of an infectious disease, not caused by the operation of the milking machine furnished by defendant, and the jury were instructed by the Court that the defendant was not liable for such damage resulting from such infectious disease.

(b). The amount of damages awarded the plaintiff by the jury is excessive, and finds no support in the evidence, and is contrary to the instructions of the Court, in that the jury in arriving at the amount of damages stated in its verdict awarded plaintiff damage not only for the injury sustained by his cattle, but also for loss of milk; and also allowed plaintiff for the injury, if any, which resulted to his cattle from the use and operation of the fourth unit purchased by him from Edgar Brothers. [304]

III.

Particulars in which said verdict is contrary to and against the charge of the Court.

(a). The verdict of the jury is contrary to the

charge of the Court, in that the jury awarded the plaintiff damages which resulted from the use and operation of the fourth unit of the milking machine which was purchased from Edgar Brothers, in violation of the instructions of the Court that the defendant was not liable for such damage.

(b). The verdict of the jury is contrary to the charge of the Court, in that in arriving at the verdict the jury duplicated damages in allowing to the plaintiff full value for all cows claimed by him to have been injured, and also allowing to the plaintiff a sum of money for loss of butter fat, and for pasturage of his cattle after the alleged injury occurred, and in so doing the jury disregarded the instructions of the Court that it should not, in arriving at its verdict, duplicate damages.

(c). The verdict of the jury is contrary to and against the charge of the Court, in that the evidence shows that the damage resulting to plaintiff's cattle, and the consequent loss of butter fat or milk, if any, was the result of the invasion into the udders of plaintiff's cattle of an infectious disease, and under the instruction of the Court the plaintiff was not entitled to recover anything for damages resulting from said cause.

(d). The verdict of the jury is contrary to and against the charge of the Court, in that the evidence shows that a large part, or all of the damages sustained by plaintiff's cattle, could have been prevented had the plaintiff given to said cattle prompt and careful treatment, and under the instructions given by the Court the defendant could not be held

[305] liable for damage which might have thus been prevented by prompt and careful treatment of the cattle by the plaintiff.

IV.

Particulars of the errors in law occurring during the trial, and excepted to by said defendant, Sharples Separator Company, a corporation, as follows:

(a). The Court erred in denying defendant's motion, as set forth in defendant's bill of exceptions, Exception No. 5, which said motion was to strike out the following testimony:

"The WITNESS.—I can't well state what we did without I tell you what passed between us. Briggs, he wanted to start the machine again, and I would not agree to it.

Mr. PARKE.—We move to strike that out, as to what Briggs wanted to do."

Said motion to strike out was then and there denied by the Court, to which ruling said defendant, Sharpless Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

(b). The Court erred in overruling defendant's objection to the following testimony as set forth in defendant's bill of exceptions, Exception No. 6 as follows:

"The WITNESS.—I finally agreed that if they would take charge of the machine on thirty cows—

Mr. PARKE.—If the Court please, we object to any agreements entered into be and between

Skinner and Mr. Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty. Briggs had no authority to contract."

Said objection was then and there overruled by the Court, to which ruling said defendant, Sharpless Separator Company, [306] then and there duly excepted, and now assigns said ruling as error.

"The WITNESS.—Briggs wanted to start the machine. I told him I would not let him do it. That was first. He then came back again. He and I went to Mr. Edgar Bros. and we came to an agreement. *An* we came to an agreement. That is the writing I entered into. My signature is at the bottom there. That is my signature. This H. S. King is Mr. Edgar Bros. man—I desired a witness. But for my receiving this written paper I would not have allowed Reed to re-start the machine.

(c). The Court erred in permitting the plaintiff to amend his complaint as set forth in defendant's Bill of Exceptions, Exception No. 7 as follows:

"The COURT.—You may amend your complaint, if you wish to. The objection is overruled.

Mr. PARKE.—Note an exception."

To which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

(d). The Court erred in denying defendant's motion to strike out testimony as set forth in defend-

ant's Bill of Exceptions, Exception No. 9, which said motion is as follows:

"Mr. PARKE.—The Sharples Separator Company, a corporation, moves to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion."

Said motion was then and there denied by the Court, to which ruling said defendant, Sharpless Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

(e). The Court erred in overruling defendant's objection to the testimony as set forth in defendant's Bill of Exceptions, Exception No. 11, as follows:

"The COURT.—Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

Mr. PARKE.—I dislike to object to the Court's questions but we object to the question as to the conditions under which he started the use of the machine." [307]

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

"The WITNESS.—Yes, sir. In October the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the machine on a string of cows. Mr. Reed and Mr. Briggs were there when the machine started, and they selected their cows that had not been injured, young cows, and then se-

lected a herd that they thought the machine would milk. I don't know that they thought that. At least, they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted. I had nothing to do with selecting the cows. The machine had gotten dirty. They took those things and boiled them, and put in new rubbers, and started them up on those thirty cows. Mr. Reed had absolute control of it. I had nothing to do with it at all. It had not been there but just a little bit, and a cow came into the corral with one of these bad quarters. I had cows that had not been milked with the milker in that herd. There were two strings. Some of those cows had had a milker on them in June and July. I had cows that this milker was not put on at any time. It is a hard question to answer, how many, I had some young cows. No cows got diseased that were not milked with the milker. Up to July they milked all the cows with the milker. I had some cows that came in after that that were not milked with the milker, but they selected some of those cows that had come in, young cows, and put the machine on them in October and November. After October [308] seven of the cows were hurt and some of them injured. I only claim those absolutely ruined for dairy purposes. Some of them were injured that I put in no claim for. And as to the value of those cows what I say were ruined, I would have to get my

instructions out again to segregate those different cows."

(f). The Court erred in overruling defendant's objection to the testimony as set forth in defendant's Bill of Exceptions, Exception No. 12, as follows:

"Mr. SWING.—Q. With reference to the guarantee which he gave you, or purported to give you at the time he consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?

Mr. PARKE.—We object to the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor."

Said objection was then and there overruled by said Court, to which ruling of the Court the defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

"The WITNESS.—They did not notify me."

(g). The Court erred in overruling defendant's objection to the testimony set forth in defendant's Bill of Exceptions, Exception No. 13, as follows:

"The COURT.—Did they ever notify you that Briggs was not their agent and had no authority to do what he did do? [309]

Mr. PARKE.—We object to the question upon all of the grounds heretofore stated."

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

“The WITNESS.—No. sir.”

(h). The Court erred in overruling defendant's objection to the testimony set forth in defendant's bill of exceptions, exception No. 14-A, as follows:

“Mr. SWING.—Q. At the time Albert J. Reed, quit, if he did, on December 20th, state what, if anything, he said at the time he quit?

A. When Mr. Reed quit?

Q. Yes.

Mr. PARKS.—We object to that as incompetent, irrelevant and immaterial, and there is no evidence before the Court of any kind, nature or description, that Reed was the agent of the Sharpless Separator Company.”

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

“The WITNESS.—The first intimation that I had that Mr. Reed was going to quit, I walked into the corral, and there was one of the cows showed she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick?’ He said, ‘Look at her back.’ And I just stopped, and it was a heifer, and the back was all swollen up. And I didn’t say a word, and Mr. Reed didn’t, for a half a minute, and then Mr. Reed said, ‘Skinner, I am

[310] going to quit. I have ruined the last cow with this machine that I expect to ruin.' He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made, in my presence, a statement to Mr. Edgar regarding his ability or inability to run the machine.

Mr. SWING.—What did he say?

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial, any statements made by Mr. Reed, there being no evidence that he was an agent or employee at this time of the Sharpless Separator Company.

The COURT.—I will sustain the objection.

(i). The Court erred in overruling defendant's objection to the testimony set forth in defendant's bill of exceptions, exception No. 15 as follows:

"The WITNESS.—(Continuing.) Reed quit. After he went in town he sent Mr. Frank a telegram. I saw the telegram written. It was written by Mr. Reed.

Q. Do you know his handwriting, or are you able to identify that? (Handing a paper to the witness.)

A. It is very much like it; I believe it is.

Mr. SWING.—We offer now in evidence the copy written by Reed, which is attached to this deposition, which Reed testified is his handwriting, and which he wrote, and also the original furnished by the company, which is word for word like this. I offer the two.

Mr. PARKE.—We object to that as incompe-

tent, irrelevant and immaterial, and further that no evidence is before the Court that Reed was an agent for the Sharpless Separator Company, or any other employee at this time.” [311]

Said objection was then and there overruled by said Court, to which said ruling said defendant, Sharpless Separator Company, then and there duly excepted, and now assigns the same as error.

“Mr. SWING.—I will read this to the jury:

‘El Centro, California, December 18, 1914.
Sharpless Separator Company, 420 Mission
Street, San Francisco. Have done everything
possible. Serious trouble started again. Tak-
ing too big a risk to continue use of machine.
We have discussed every possible phase of situ-
ation, but quit milking. Safest way, or we will
have too big a loss according to our agreement.
Will await instructions here. Wire at once.
Albert J. Reed.’ ”

(j). The Court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, exception to No. 16, as follows:

“Mr. SWING.—Was it started before or after
that written paper was signed by Mr. Briggs?

Mr. PARKE.—We object to that. There is
no evidence of a written contract of any kind.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.”

Said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

“The WITNESS.—After. Briggs was there
for one milking, after Reed came, and then a

time or two after. Briggs helped Reed to sterilize everything and get it milking. Reed operated it from October until just after Christmas, and while the machine was being operated something like seven or eight cases, I think, of swollen quarters [312] developed. During that time no new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20th, they selected a string of good cows. I think they were mostly young cows that had not been used on the milking machine before. Some of the cows had had their first calves. I don't know how many. As to what was the occasion of Reed's quitting on December 20th, why, when he came into the kitchen—he always came into the kitchen where I was—when he came in, he said he wasn't going to put the milker on another cow; and I wanted to know why, and the words that he used was that he had ruined the last cow for us with a milking machine that he was going to."

(k) The Court erred in denying defendant's motion as set forth in defendant's bill of exceptions, Exception No. 18 as follows:

"Thereupon the defendant, Sharpless Separator Company, made the following motion:

"We desire to move for a nonsuit, on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was for the indis-

criminate use of the four units, and it further appearing from the evidence that one unit was purchased from Edgar Brothers, and three from the Sharpless Separator Company, and no evidence having been introduced, and no basis given upon which the jury or the Court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharpless Separator Company, or the damage which resulted from the unit purchased by the plaintiff from Edgar Brothers Company. Upon the further ground that the testimony as offered by the plaintiff is not sufficient [313] to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows.'

The COURT.—I will overrule your motion.

Exception granted."

And said defendant, said Sharpless Separator Company, a corporation now assigns said ruling as error.

(1). The Court erred in sustaining the plaintiff's objection to defendant's testimony, as set forth in defendant's bill of exceptions, exception No. 19, as follows:

"The WITNESS.—I have seen a Sharpless milking machine, and have seen them in operation. I have examined the udders of cows upon which the Sharpless milking machine was being used. The last place I examined was at Westchester, at a dairy that is run at the experimental farm of the Sharpless Separator Com-

pany. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharpless Separator Company. I simply went there to observe it.

Q. State what you have observed in the condition of the udders of those cows.

Mr. SWING.—We object to the question on the ground that the evidence as to how other machines worked is not admissible to show compliance with the warranty; and we object to the question on the ground as incompetent, irrelevant and immaterial, how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT.—I will sustain the objection as to the cows at Westchester, Pennsylvania.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. [314]

(m). The Court erred in sustaining plaintiff's objection to the defendant's testimony, as set forth in defendant's bill of exceptions, exception No. 20, as follows:

“Q. State whether or not during the year 1914, milk or any other dairy products from the Imperial Valley were permitted in the city of Los Angeles to be shipped here for consumption in Los Angeles City.

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial.”

Said objection was then and there sustained by

said Court, to which ruling the defendant said Sharpless Separator Company, then and there duly excepted, and now assigns said ruling as error.

(n). The Court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, exception No. 22, as follows:

"The COURT.—Now, if you operate this machine as directed in this book, is it a successful machine? A. Yes.

Q. Would it hurt the cow's bag? A. No.

Mr. PARKS.—Now, just explain on what you base your answer to the question asked by the court.

A. When the machines were installed in our herd, we had a book of instructions, and we followed it.

The COURT.—I don't care anything about your herd.

A. Well, those are the instructions.

M. PARKE.—Well, if the Court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it [315] is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. SWING.—Our objections to the offer as it now stands are that it does not include any offer to show that the conditions under which this machine was operated were similar or identical with those under which the machine of the plaintiff was operated.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

(o). The Court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exception, exception No. 23, as follows:

“Q. State whether or not you got as much milk from a dairy herd of two hundred cows at the Shore Acres dairy as you did from hand milking.

Mr. SWING.—We object to that; it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

(p). The Court erred in overruling defendant's objection to the plaintiff's testimony as set forth in defendant's bill of exception, exception No. 26, as follows:

“Mr. SWING.—For whom did you install—for whom were you working when you installed the mechanical milker?

Mr. PARKE.—We object to that question on the ground it [316] is not proper cross-examination, and was not called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception."

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

"A. I was working for the Sharples Separator Company."

The Court erred in overruling defendant's objections to the testimony of Albert J. Reed with regard to his employment with the Sharpless Separator Company, and the testimony of said witness as to his visits to the ranch of W. W. Skinner, and what he did in the way of operating the machine on the ranch of said W. W. Skinner, and the testimony of said witness as to the effect of the operation of said mechanical milker, and the physical condition of the cows of the plaintiff; all of which testimony was duly objected to by the defendant as not being proper cross-examination, as more particularly set forth in defendant's bill of exceptions, and covered by exceptions numbered 27 to 55, inclusive; and said defendant, said Sharpless Separator Company, a corporation, now assigns said rulings as errors.

(q). The Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, Exception No. 58, as follows:

"Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State dairy inspector down there, were such that milk and dairy products were not permitted to be

shipped from Imperial Valley into Los Angeles city for consumption?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination. [317]

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception."

The said defendant, said Sharpless Separator Company, a corporation, assigns said ruling as error.

(r). The Court erred in overruling defendant's objection to plaintiff's testimony as set forth in defendant's bill of exceptions, exception No. 60, as follows:

"Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharpless mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked by the mechanical milker, and that when the condition so appeared the affected cows were taken off the milker and milked together with other cows, then being milked by hand, not being isolated, and that the milkers did not wash their hands between cows, that the cows milked by hand got well, and the swollen quarters did not spread to a single other cow being milked by hand: What would you say as to what was the cause of the swollen quarters?

Mr. PARKE.—We object to the question as assuming only a partial statement of the uncontradicted facts as presented by the evidence, it appearing clearly from the evidence that there

was present in the milk from Skinner's cows certain germs designated as staphylococci, and it be unfair to ask the witness the cause of such condition, without setting forth that condition. And further, nothing is said about the manner in which the milking machine was operated.

The COURT.—Well, I overrule the objection.

Mr. PARKE.—Note an exception.” [318]

And said defendant, said Sharpless Separator Company, a corporation, now assigns, said ruling as error.

(s). The Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in defendant's bill of exceptions, exception No. 64 as follows:

“Q. I will ask you whether, in your opinion, the Sharpless mechanical milker can be operated upon dairy cows in the Imperial Valley without seriously injuring some of them?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.”

And said defendant, said Sharpless Separator Company, now assigns said ruling as error.

“A. No, it cannot.”

(t). The Court erred in overruling defendant's objection to plaintiff's testimony, as set forth in de-

fendant's bill of exceptions, Exception No. 65, as follows:

"Q. What in your opinion, would be the effect upon the string of dairy cows if milked any considerable length of time with a Sharples mechanical milker, even though all the instructions furnished by the company were strictly followed?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, presuming a state of facts not proven in this case, and incompetent, irrelevant and immaterial.

[319]

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception."

And said defendant, said Sharpless Separator Company, a corporation, now assigns said ruling as error.

"A. It would eventually kill the cows if persisted in. It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine, if persisted in." [320]

U. The Court erred in refusing to give to the jury the Instruction No. II as requested by the defendant and as set forth in defendant's bill of exceptions, Exception No. 66, as follows:

"If you believe from all the evidence that the plaintiff's cows were injured by the use of the milking machine furnished by the defendant, Sharples Separator Company while being operated in strict accordance with the instructions

given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiff's damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to recover anything additional for care or keep of said cows, or for loss of butter fat therefrom."

Which said Instruction No. II said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instructions to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

V. The Court erred in refusing to give to the jury instruction No. III as requested by defendant and as set forth in defendant's bill of exceptions, Exception 67, as follows:

"You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat."

Which said instruction No. III, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

W. The Court erred in refusing to give to the jury Instruction No. IV as requested by defendant and

as set [321] forth in defendant's bill of exceptions, Exception No. 68, as follows:

"There is no evidence before the Court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor."

Which said Instruction No. IV said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

X. The Court erred in refusing to give to the jury Instruction No. VII as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 69, as follows:

"If, from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant Sharples Separator Company cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition."

Which said Instruction No. VII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corpora-

tion, then and there duly excepted.

Y. The Court erred in refusing to give to the jury Instruction No. IX as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 70, as follows:

"If you believe, from all the evidence, that plaintiff's cows had infectious mammitis, or [322] other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased."

Which said Instruction No. IX, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

Z. The Court erred in refusing to give to the jury Instruction No. XI as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 71, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows which resulted in the injury complained of by him, was a traumatic, or noninfectious disease of the udder, known as ordinary garget, and that the perma-

nent injury to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for any injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff."

Which said Instruction No. XI said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and in said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

AA. The Court erred in refusing to give the jury Instruction No. XII as requested by defendant and as set [323] forth in defendant's bill of exceptions, Exception No. 72, as follows:

"You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company."

Which said Instruction No. XII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

BB. The Court erred in refusing to give to the jury Instruction No. XIV as requested by defendant

and as set forth in defendant's bill of exceptions, Exception No. 73, as follows:

"If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper, and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant Sharples Separator Company is not liable."

Which said Instruction No. XIV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

CC. The Court erred in refusing to give to the jury Instruction No. XV, as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 74, as follows:

"If you believe, from all the evidence, that the death of the three cows, and the diseased condition of the udders of the other twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the [324] defendant in this case is not liable to the plaintiff for such damage."

Which said Instruction No. XV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said

defendant, Sharples Separator Company, a corporation, then and there duly excepted.

DD. The Court erred in refusing to give to the jury Instruction No. XVI as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 75, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows resulted from the negligence or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage."

Which said Instruction No. XVI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, Sharples Separator Company, a corporation, then and there duly excepted.

EE. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 76, as follows:

"This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would

not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the [325] instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are *to move* a party to this action, because as to them the action was dismissed."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

FF. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 77, as follows:

"The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the

milker was started his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated."

"If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow his damages in the sum which would be a fair compensation for the loss incurred by an effort in good faith to use the machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker, including the representations made by the defendant company and its employees.

"The word 'fair' used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than 'full' or 'complete' compensation; it is used rather in the sense of 'just.' "

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court. [326]

GG. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 78, as follows:

"The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said the Sharpless Separator Company guaranteed the machine to

be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples Mechanical milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

HH. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 79, as follows:

"You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being Plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

"You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been

complied with, over its actual value at that time.

"Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of [327] said instruction to said jury by said Court.

II. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 80, as follows:

"The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the approximate result of the operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the defendant company."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving

of said instruction to said jury by said Court.

JJ. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 81, as follows:

"If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine."

And said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

KK. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 82, as follows:

"In estimating the value of the cows that were injured the true measure of such damage [328] is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows."

And said defendant, said Sharples Separatory Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

LL. The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception No. 83, as follows:

"You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

"1st. Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

"2d. Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no further service as a milk cow until she was well enough to be disposed of for beef; then allow the difference between the value of the cow before she was injured and the value of the cow for beef.

"3d. Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the cow before her injury, and the value of the cow as a milk cow after her injury.

"4th. Where a cow was not permanently injured, but only injured for a time, you shall allow for loss of butter fat during the time she

was injured and did not give her normal amount of milk.

"5th. If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

[329]

"In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows."

Said defendant, said Sharples Separator Company, a corporation, now assigns as error the giving of said instruction to said jury by said Court.

And be it further remembered that each and all of the foregoing rulings and exceptions made and taken during the progress of said trial, were made and taken in the presence of said jury, while said jury was still at the bar of said court, and before said jury retired to deliberate upon its verdict. [330]

Thereupon and after the jury had retired to consider their verdict, the Court duly made and entered an order giving the defendant to and including the 5th day of December, 1916, within which to serve and file its bill of exceptions, and thereafter the said parties stipulated that the defendant should have to and including the 23d day of December, 1916, within which to serve and file its bill of exceptions, and upon which said stipulations the Court duly and regularly made an order giving said defendant to and including

the 23d day of December, 1916, within which to serve and file its bill of exceptions, and the said bill of exceptions has been prepared, served and filed within the time by law and extended by stipulations of counsel and the order of the Court, and counsel for defendant asks that the same be allowed and approved as correct.

And be it further remembered that the above and foregoing bill of exceptions is a full, true and correct statement of all the evidence in the cause, and also of all objections, rulings and exceptions relied on by said defendant Sharples Separator Company, a corporation, instructions requested by said defendant, but refused by said Court, charge of the Court and exceptions thereto, and other proceedings in and upon the said trial; and that no other different evidence, objections, rulings or exceptions relied on by said defendant, or instructions requested by said defendant but refused, or charge of the Court of other proceedings, were had in or upon said trial. And now, within due and proper time, said defendant, Sharples Separator Company, a corporation, presents and tenders this its said bill of exceptions to said Court, and in order that said exceptions may be preserved and perpetuated, and in furtherance of justice and that right may be done, the said defendant, Sharples Separator Company, presents [331] the foregoing as its bill of exceptions herein, and prays that the same may be settled, approved and allowed, as true and correct in all particulars, and signed and certified as provided by law and made a part of the records in the above-entitled cause.

Dated Los Angeles, California, December 23d,
1916.

SHARPLES SEPARATOR COMPANY, a
Corporation.

Said Defendant.

By WILLARD P. SMITH,
BICKSLER, SMITH and PARKE,
J. J. DUNNE,

Its Attorneys. [332].

BE IT FURTHER REMEMBERED, that on October 21st, 1916, a stipulation was duly entered into by and between the plaintiff and defendant, and order made and entered thereon, granting defendant until the 5th day of December, 1916, within which to prepare, serve and file its bill of exceptions; and that thereafter, to wit, on November 20th, 1916, a stipulation was entered into between the plaintiff and defendant, and order duly entered thereon, granting the defendant a further extension of time or until December 15th, 1916, within which to prepare, serve and file its proposed bill of exceptions; and that thereafter, to wit, on December 6th, 1916, it was stipulated by and between the plaintiff and defendant, and order duly entered thereon, granting defendant a further extension of time or until December 23d, 1916, within which to prepare, serve and file its proposed bill of exceptions; that the proposed bill of exceptions was duly served and filed on the 23d day of December, 1916. That at plaintiff's request, the following stipulation was duly entered into by and between the plaintiff and defendant:

“IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, through their respective attorneys, that the time within which the plaintiff W. W. Skinner, may prepare, file and serve his proposed amendments to Defendant’s proposed Bill of Exceptions in the above-entitled action, be and *he* is hereby extended and enlarged until and including Wednesday, January 31st, 1917.

“IT IS FURTHER STIPULATED that a further stay of execution to and including the said 15th day of February, 1917, may be granted.

“DATED December 29th, 1916.”

That an order in accordance with the foregoing stipulation was duly entered by the Honorable Oscar A. Trippet, Judge.

That thereafter, to wit, on January 26th, 1917, on motion made in open court, by Dale H. Parke, Esq., of counsel for defendant, the attorney for plaintiff being then and there [333] present, but not consenting thereto, the following order was duly made, given and entered by the Honorable Oscar A. Trippet, Judge, which said order is as follows:

“On motion of Dale H. Parke, Esq., of counsel for defendant, it is ordered that said defendant be and they are hereby granted five days after the filing of proposed amendments to the proposed bill of exceptions herein within which to present said bill of exceptions and amendments for settlement.”

That thereafter, to wit, or the 31st day of January, 1917, the plaintiff served and filed proposed amend-

ments to the proposed bill of exceptions.

And thereafter, to wit, on the 3d day of February, 1917, the defendant served notice upon the plaintiff that the defendant dissented to the proposed amendments to the proposed bill of exceptions, and that on the 6th day of February, 1917, at the hour of 9:30 A. M., the defendant would present the proposed bill of exceptions and proposed amendments to the Honorable Oscar A. Trippet, Judge, for settlement.

That at 9:30 A. M. on the 6th day of February, 1917, the defendant, in the presence of attorney for plaintiff, who objected as hereinafter stated, presented the proposed bill of exceptions, and proposed amendments to the Honorable Oscar A. Trippet, Judge, for settlement. Said objection, so made by plaintiff as aforesaid, was to the presentation, settlement and signing of the said bill of exceptions on the ground that the said bill of exceptions had not been presented to the Judge for settlement and signing, nor was the same settled or signed within the time allowed by law or within the term of the Court at which the trial was had and judgment rendered and entered.

That thereafter, to wit, on the said 6th day of February, 1917, further time being necessary to make the corrections in the proposed bill of exceptions, on application of Dale H. Parke, Esq., of counsel for defendant, an order was duly [334] made, given and entered by the Honorable Oscar A. Trippet, Judge, over the objection of plaintiff, granting to the defendant additional time or until the hour of 10 o'clock A. M. on Saturday, the 10th day of Feb-

ruary, 1917, within which to present the proposed bill of exceptions as amended for settlement and signing. That no other or different orders or stipulations with respect to the time for filing, presentation and settling of the proposed bill of exceptions was made or entered herein. [335]

Stipulation Approving Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions is true and correct in all particulars and that the same may be made a part of the records in the above-entitled cause.

Dated Los Angeles, California, February 8th, 1917.

W. W. SKINNER,
Plaintiff.
By PHIL D. SWING,
His Attorney.

SHARPLES SEPARATOR COMPANY, a
Corporation,

Said Defendant.

By WILLARD P. SMITH,
BRISLER, SMITH and PARKE,
J. J. DUNNE,

Its Attorneys. [336]

Order Settling Bill of Exceptions.

United States of America,
Southern District of California,—ss.

In the matter of the foregoing bill of exceptions duly presented in time by the defendant, Sharples Separator Company, a corporation, plaintiff in error herein:

It is hereby ordered by said Court that said bill of exceptions be, and the same is hereby settled, allowed and approved as true and correct in all particulars; and it is hereby further ordered by said Court that said bill of exceptions be, and the same is hereby made a part of the records in the above-entitled cause.

Given, made, and dated at Los Angeles, California, this 9th day of Feb., A. D. 1917.

OSCAR A. TRIPPET,
United States District Judge. [337]

[Endorsed]: No. 413—Civil. In the District Court of the United States, Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, and Edgar Bros. Company, a Corporation, Defendants. Bill of Exceptions. Filed Feb. 9, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [338]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Petition for Writ of Error.

The above-named defendant, the Sharples Separator Company, a corporation, conceiving itself aggrieved by the final judgment given, made and entered by the above-entitled court, in the above-entitled cause, upon the issues therein joined, under date of October 13th, A. D. 1916, said judgment being now on file in said cause and court, it hereby petitions the above-entitled court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, from said judgment, and from the whole thereof, for the reasons set forth in the assignments of errors, which is filed herewith, under and pursuant to the law of the United States in that behalf made and provided; and it prays that this petition for said writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was given, made and entered as aforesaid, duly authenticated, may be [339] sent to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California.

Dated January 13th, A. D. 1917.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
J. J. DUNNE,
Attorneys for Said Plaintiff in Error.

Receipt of a copy of the foregoing Petition is hereby acknowledged this 17 day of February, 1917.

PHIL D. SWING,

Attorneys for Defendants in Error.

[Endorsed]: Original. No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Petition for Writ of Error. Filed Feb. 23, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens' Nat'l Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752; Main 5166, J. J. Dunne, Attorneys for Defendant. [340]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 413—Civil.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a Corporation,

Defendant.

Assignments of Error.

Now comes the above-named defendant, plaintiff in error herein, and says that in the record and pro-

ceedings in the above-entitled action there is manifest error, and now makes, presents and files the following assignments of errors upon which it will rely as follows, to wit:

I.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that there is no evidence upon which said jury could find that the milking machine furnished by the defendant in said action, caused the injury shown to have been sustained by plaintiff's cows.

II.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: [341] that the plaintiff failed to introduce any evidence from which the jury might determine the amount of injury or loss, if any, that was sustained by plaintiff from the use of the three units purchased from the defendant, and the one unit purchased from Edgar Brothers Company.

III.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the injury actually resulting to plaintiff's cows, and the consequent loss of milk, if any, was due to the invasion of an infectious disease, not produced or caused by the operation of the machine furnished by the defendants.

IV.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that the plaintiff's cows were affected with an infectious disease, and that such infectious disease was not and could not have been caused by the operation of the milking machine furnished by the defendant.

V.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the evidence does not show that the plaintiff was damaged in the amount found by the jury. [342]

VI.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows that a large part of the damage sustained by the plaintiff's cattle resulted from a lack of proper care and treatment thereof by the plaintiff and that had said plaintiff treated said cows in a proper and careful manner, a large part of the injury sustained by said cattle would have been prevented.

VII.

The evidence received upon the trial of the above-entitled action was and is wholly insufficient to justify the verdict of the jury impaneled in said action, in this: that the preponderance of the evidence shows

that the defendant committed no breach of warranty, and that whatever damage was suffered by the plaintiff was the result of other causes than the operation of the milking machine furnished by the defendant.

VIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, because of errors of law occurring during the trial and excepted to by the above-named defendant and hereinafter included in these assignments of errors.

IX.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, because of the insufficiency of the [343] evidence to justify said verdict and/or judgment, the particulars of such insufficiency being included in these assignments of errors.

X.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the preponderance of the evidence shows that the damage sustained by plaintiff's cattle resulted from the invasion into the udders of said cattle of an infectious disease, not caused by the operation of the milking machine furnished by defendant, and the jury were instructed by the Court that the defendant was not liable for such damage resulting from such infectious disease.

XI.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the law and the evidence, in this, that the amount of damages awarded the plaintiff by the jury is excessive, and finds no support in the evidence, and is contrary to the instructions of the Court, in that the jury in arriving at the amount of damages stated in its verdict awarded plaintiff damage not only for the injury sustained by his cattle, but also for loss of milk; and also allowed plaintiff for the injury, if any, which resulted to his cattle from the use and operation of the fourth unit purchased by him from Edgar Brothers.

XII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the [344] charge of the Court to the jury in said action, in this, that the jury awarded the plaintiff damages which resulted from the use and operation of the fourth unit of the milking machine which was purchased from Edgar Brothers, in violation of the instructions of the Court that the defendant was not liable for such damage.

XIII.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the Court to the jury in said action, in this, that in arriving at the verdict the jury duplicated damages in allowing to the plaintiff full value for all cows claimed by him to have been injured, and also allowing to the plaintiff a sum of

money for loss of butter fat, and for pasturage of his cattle after the alleged injury occurred, and in so doing the jury disregarded the instructions of the Court, that it should not, in arriving at its verdict, duplicate damages.

XIV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the Court to the jury in said action, in this, that the evidence shows that the damage resulting to plaintiff's cattle, and the consequent loss of butter fat or milk, if any, was the result of the invasion into the udders of plaintiff's cattle of an infectious disease, and under the instructions of the Court the plaintiff was not entitled to recover anything for damages resulting from said cause. [345]

XV.

The verdict and/or judgment given and made in the above-entitled cause was and is contrary to and against the charge of the Court to the jury in said action, in this, that the evidence shows that a large part, or all of the damages sustained by plaintiff's cattle, could have been prevented had the plaintiff given to said cattle prompt and careful treatment, and under the instructions given by the Court the defendant could not be held liable for damage which might have thus been prevented by prompt and careful treatment of the cattle by the plaintiff.

XVI.

Said Court erred in overruling the objection of said defendant to the introduction in evidence be-

fore said jury of the following printed matter:

"A lifetime study in the dairyman's interest enabled these experts to solve the apparently impossible problem of automatic or mechanical milking."

"The gentle massage of the teat cup with its uniform action induces the cows to let down the milk freely, a condition which frequently increases milk production."

"The teat cup with upward squeeze always is soothing, even tempered, never in a hurry. After drawing each squirt of milk it gently massages the cow's teats, keeping the teats and udder of the most delicate or hardiest cow in a soft, cool, natural, perfect condition, free from congestion."

"By the proper use of this all important feature, which is obtainable only in the Sharples Milker, the teats and udder of either the most delicate or the most hardy [346] cows are kept in a soft, cool, natural condition. Until we made this discovery, we never thought of offering a machine for sale, though long before that time we were owners of patents on the best pulsating suction milkers ever devised."

These statements merit special consideration. They are conservative—"

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said Court, and

said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said Court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XVII.

Said Court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“The Sharples Mechanical Milker is quite different from others which give the teats an upward squeeze, which not only absolutely prevents all irritation of teats and udders but actually benefits the cows and improves the flow of milk.”

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said Court and said printed matter was then and [347] there received and read in evidence to said jury, to which ruling and action of said Court, said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XVIII.

Said Court erred in overruling the objection of said defendant to the introduction in evidence before said jury of the following printed matter:

“Q. Is it safe to milk high-grade cows with the Milker? A. This question has already been answered pretty thoroughly. The high-

grade cow is much safer when milked by the Sharples Milker than when milked by hired help, and just as safe as when milked by the owner himself.

"A. Does it not have a harmful effect on some cows? A. From our knowledge of what the milking machine has accomplished on the 80,000 cows upon which it is used daily, we know that the Sharples Milker has a tendency to increase the production of milk. Of some cows it does not seem to increase the production, of others it increases it anywhere up to 10%.

"If the hand milkers have been poor, the Sharples Milker practically always shows an increase in milk production. The reason for this is that the 'upward squeeze' keeps the teats in perfect condition. The cows are milked with an even and regular motion studied by us and made correct. If the hand milkers were very good it is probable that the machine will not be able to improve upon them; otherwise, the probabilities are that it will. We know positively that the Sharples Milker never has an ill-effect upon the cows, provided the machine is kept in reasonable [348] order, and we keep enough experts out on the territory to see that all dairymen do keep their machines in good order.

"There is not the least tendency to dry up the cows prematurely nor have any other harmful effect."

Said objection was made upon the grounds that said printed matter was incompetent, irrelevant and

immaterial, and upon the ground that the present cause was a case of a written warranty; said objection was then and there overruled by said Court and said printed matter was then and there received and read in evidence to said jury, to which ruling and action of said Court said defendant then and there duly excepted; and said defendant now assigns said ruling as error.

XIX.

Said Court erred in receiving, and in denying the motion of said defendant to strike out, the following answer and statement of said plaintiff during his direct examination, to wit:

“They was to send this demonstrator there once a month to go through my herd and see if everything was working all right.”

Said motion to strike out was made upon the grounds that the statement of the witness as to the duties on the part of said defendant, was incompetent; said statement and answer of said witness was then and there received and given in evidence to said jury, to which ruling and action of said Court said defendant then and there duly excepted; and said defendant now assigns said ruling as error. [349]

XX.

Said Court erred in receiving, and in denying the motion of said defendant to strike out, the following testimony as given by said plaintiff during his direct examination as set forth in defendant's bill of exceptions, exception Number 5, as follows:

“The WITNESS.—I can't well state what he did without I tell you what passed between us.

Briggs, he wanted to start the machine again, and I would not agree to it.

Mr. PARKE.—We move to strike that out, as to what Briggs wanted to do."

Said motion to strike out was then and there denied by the Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error.

XXI.

Said Court erred in overruling defendant's objection to the following testimony as set forth in defendant's bill of exceptions, Exception Number 6, as follows:

"The WITNESS.—I finally agreed that if they would take charge of the machine on thirty cows—

Mr. PARKE.—If the Court please, we object to any agreements entered into by and between Skinner and Mr. Briggs, or anything in the nature of a warranty; this machine was sold on a written warranty. Briggs had no authority to contract."

Said objection was then and there overruled by the Court, to which ruling said defendant, Sharples Separator Company then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as [350] follows:

"The WITNESS.—Briggs wanted to start the machine: I told him I would not let him do it; that was first; he then came back again; he and I went to Mr. Edgar Bros. and we came to

an agreement; and we came to an agreement; that is the writing I entered into; my signature is at the bottom there; that is my signature; this H. S. King is Mr. Edgar Bros. man—I desired a witness; but for my receiving this written paper I would not have allowed Reed to re-start the machine.”

XXII.

Said Court erred in permitting the plaintiff to amend his complaint, as set forth in defendant's bill of exceptions, Exception Number 7, as follows:

“The COURT.—You may amend your complaint, if you wish to. The objection is overruled.

Mr. PARKE.—Note an exception.”

To which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

XXIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the plaintiff during his direct examination, as set forth in defendant's bill of exceptions, Exception Number 8, as follows:

“Q. Did you suffer any loss as the result of the operation of this milker upon your herd in the quantity or amount of milk or butter fat you received from that herd?”

Said objection was made upon the ground that said [351] question called for a conclusion of the witness. Said objection was overruled by said Court, to which ruling said defendant then and there noted an

exception, and now assigns said ruling as error. Thereupon, the witness testified as follows:

“I did.”

XXIV.

Said Court erred in denying defendant's motion to strike out testimony as set forth in defendant's bill of exceptions, Exception Number 9, which said motion is as follows:

“Mr. PARKE.—The Sharples Separator Company, a corporation, moves to strike out all of the testimony of the witness on the value of the milk, as stating a mere conclusion.”

Said motion was then and there denied by the Court, to which ruling said defendant, Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Said testimony so retained was as follows:

“The WITNESS.—The milk that I lost by reason of this amounts, I think, to \$1500—the value of it.”

XXV.

Said Court erred in permitting said plaintiff to file an amendment to his amended complaint, as to damages, as set forth in defendant's bill of exceptions, Exception Number 10.

Said defendant objected to the filing of said amendment on the ground that it attempts to set out elements of damage not set out in the original complaint, or in the [352] bill of particulars furnished by the plaintiff; and upon the ground that this defendant has had no opportunity of investigating the question of damage set out in the amendment;

and that at this time the plaintiff should not be permitted to insert other and different claims for damages than those covered by his original bill of particulars and complaint.

Said objection was then and there overruled, by said Court, and said amendment permitted, to which ruling and action of said Court, said defendant then and there duly excepted and now assigns said ruling as error.

XXVI.

Said Court erred in overruling defendant's objection to the testimony as set forth in defendant's bill of exceptions, Exception Number 11, as follows:

"The COURT.—Q. Did you consent to its being used on your cows by reason of what Briggs induced you to do?

Mr. PARKE.—I dislike to object to the Court's questions but we object to the question as to the conditions under which he started the use of the machine."

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"The WITNESS.—Yes, sir. In October the machine was used practically two months, and a man by the name of Reed operated it. I did not employ Reed. Mr. Reed came and took charge of the machine on a string of cows. Mr. Reed and [353] Mr. Briggs were there when the machine started, and they selected their cows

that had not been injured, young cows, and then selected a herd that they thought the machine would milk. I don't know that they thought that. At least, they picked such cows as they wanted. I had nothing to do with it. I told them to pick the herd and get just such cows as they wanted. I had nothing to do with selecting the cows. The machine had gotten dirty. They took those things and boiled them, and put in new rubbers, and started them up on those thirty cows. Mr. Reed had absolute control of it. I had nothing to do with it at all. It had not been there but just a little *but*, and a cow came into the corral with one of those bad quarters. I had cows that had not been milked with the milker in that herd. There were two strings. Some of those cows had had a milker on them in June and July. I had cows that this milker was not put on at any time. It is a hard question to answer, how many. I had some young cows. No cows got diseased that were not milked with the milker. Up to July they milked all the cows with the milker. I had some cows that came in after that that were not milked with the milker, but they selected some of those cows that had come in, young cows, and put the machine on them in October and November. After October seven of the cows were hurt and some of them injured. I only claim those absolutely ruined for dairy purposes. Some of them were injured that I put in no claim for. And as to the value of those cows what I say were ruined, I would

have to get my instructions out again to segregate those different cows.” [354]

XXVII.

Said Court erred in overruling defendant’s objection to the testimony as set forth in defendant’s bill of exceptions, exception Number 12, as follows:

“Mr. SWING.—Q. With reference to the guarantee which he gave you, or purported to give you at the time he consented to restarting the milker, I will ask you if at any time since you have ever received any notice or intimation from the company that that was not a valid contract or guarantee?

Mr. PARKE.—We object to the question—that a guarantee was given by Briggs; and if that alleged contract was not binding upon the company, it would not make any difference whether they ever repudiated it or not, if there was no consideration therefor.”

Said objection was then and there overruled by said Court, to which ruling of the Court the defendant, said Sharples Separator Company, a corporation, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS.—They did not notify me.”

XXVII.

Said Court erred in overruling defendant’s objection to the testimony set forth in defendant’s bill of exceptions, exception Number 13, as follows:

“The COURT.—Did they ever notify you that

Briggs was not their agent and had no authority to do what he did do?

Mr. PARKE.—We object to the question upon all of the grounds heretofore stated."

Said grounds are stated in assignment of error number *XXVII.* [355]

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"The WITNESS.—No, sir."

XXIX.

Said Court erred in receiving, and in refusing to strike out the answer of the witness "No, sir" to the question, "Did they ever notify you that Briggs was not their agent and had no authority to do what he did do during the direct examination of said plaintiff," as set forth in defendant's bill of exceptions, Exception Number 14.

Said motion was made upon the grounds that no alleged contract by Briggs was binding upon the company, and that it would not make any difference whether the company repudiated it or not if there was no consideration therefor.

Said motion to strike out was then and there denied by said Court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

XXX.

Said Court erred in overruling defendant's objection to the testimony set forth in defendant's bill of

exceptions, Exception Number 14-A, as follows:

“Mr. SWING.—Q. At the time Albert J. Reed quit, if he did, on December 20th, state what, if anything, he said at the time he quit?

A. When Mr. Reed quit? [356]

Q. Yes.

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial, and there is no evidence before the Court of any kind, nature or description, that Reed was the agent of the Sharples Separator Company.”

Said objection was then and there overruled by the Court, to which ruling said defendant, said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“The WITNESS.—The first intimation that I had that Mr. Reed was going to quit, I walked into the corral, and there was one of the cows showed she was not feeling good, and I was in a hurry and was going to the ranch, and I said, ‘Mr. Reed, is that cow sick?’ He said, ‘Look at her bag.’ And I just stopped, and it was a heifer, and the bag was all swollen up. And I didn’t say a word, and Mr. Reed didn’t, for a half a minute, and then Mr. Reed said, ‘Skinner, I am going to quit. I have ruined the last cow with this machine that I expect to ruin.’ He quit, and I took him to town, and after he got to town, the first thing he did, he went in and talked to Mr. Edgar. He made, in my presence, a

statement to Mr. Edgar regarding his ability or inability to run the machine.

XXXI.

Said Court erred in overruling defendant's objection to the testimony set forth in defendant's bill of exceptions, Exception Number 15, as follows:

"The WITNESS.—(Continuing.) Reed quit. After he went to town he sent Mr Frank a telegram. I saw the telegram written. It was written by Mr. Reed.

Q. Do you know his handwriting, or are you able to [357] identify that? (Handing a paper to the witness.)

A. It is very much like it; I believe it is.

Mr. SWING.—We offer now in evidence the copy written by Reed, which is attached to this deposition, which Reed testified is his handwriting, and which he wrote, and also the original furnished by the company, which is word for word like this. I offer the two.

Mr. PARKE.—We object to that as incompetent, irrelevant and immaterial, and further that no evidence is before the Court that Reed was an agent for the Sharples Separator Company, or any other employee at this time."

Said objection was then and there overruled by said Court, to which said ruling said defendant, Sharples Separator Company, then and there duly excepted, and now assigns the same as error. Thereupon said copy and original was received and read in evidence to the jury as follows:

"Mr. SWING.—I will read this to the jury:

'El Centro, California, December 18, 1914,
Sharples Separator Company, 420 Mission
Street, San Francisco. Have done everything
possible. Serious trouble started again. Tak-
ing too big risk to continue use of machine. We
have discussed every possible phase of situation,
to quit milking safest way, or we will have too
big a loss according to our agreement. Will
await instructions here. Wire at once. Albert
J. Reed.' "

XXXII.

Said Court erred in overruling defendant's objec-
tion to the testimony set forth in defendant's bill of
exceptions, Exception Number 16, as follows:

"Mr. SWING.—Was it started before or after
that [358] written paper was signed by Mr.
Briggs?

Mr. PARKE.—We object to that. There is
no evidence of a written contract of any kind.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception."

Said defendant, said Sharples Separator Company,
a corporation, now assigns said ruling as error.
Thereupon the witness testified as follows:

"The WITNESS.—After. Briggs was there
for one milking, after Reed came, and then a
time or two after; Briggs helped Reed to ster-
ilize everything and get it milking. Reed oper-
ated it from October until just after Christmas,
and while the machine was being operated some-
thing like seven or eight cases, I think, of swol-
len quarters developed. During that time no

new cases of swollen quarters developed among the two strings that were being milked by him. As to what cows Briggs and Reed put the milker on when they started on October 20th, they selected a string of good cows. I think they were mostly young cows that had not been used on the milking machine before. Some of the cows had had their first calves; I don't know how many. As to what was the occasion of Reed's quitting on December 20th, why, when he came into the kitchen—he always came into the kitchen where I was—when he came in, he said he wasn't going to put the milker on another cow; and I wanted to know why, and the words that he used was that he had ruined the last cow for use with a milking machine that he was going to."

XXXIII.

Said Court erred in overruling the objection of said [359] defendant to the following question asked of said plaintiff when recalled as a witness in his own behalf for further redirect examination, as set forth in defendant's bill of exceptions, Exception Number 17, as follows:

"Q. At the time, Mr. Skinner, you purchased the three units from Mr. Hickson representing the Sharples Separator Company, what, if anything, was said by him as to the manner or way you could purchase another unit if you so desired?"

Said objection was made upon the grounds that said question was incompetent, irrelevant and imma-

terial and also sought to develop matters already testified to.

Said objection was overruled by said Court, to which ruling of said Court said defendant then and there duly excepted and now assigns said ruling as error.

Thereupon the witness testified as follows:

“A. Why, Mr. Hickson was there, with Mr. Edgar’s man, and he told me any time I wanted another unit I could either order it through them or notify Mr. Edgar, and they would get the unit for me.”

XXXIV.

The Court erred in denying defendant’s motion, as set forth in defendant’s bill of exceptions, Exception Number 18, as follows:

“Thereupon the defendant, Sharples Separator Company, made the following motion:

“We desire to move for a nonsuit, on the ground that it appears from the evidence that the damage, if any, suffered, even under the testimony of the plaintiff, was for the indiscriminate use of the four units, and it further appearing from the evidence that one unit was purchased [360] from Edgar Brothers, and three from the Sharples Separator Company, and no evidence having been introduced, and no basis given upon which the jury or the Court could arrive at the damage, if any, which ensued from the three units purchased from the defendant, Sharples Separator Company, or the damage which resulted from the unit purchased by the

plaintiff from Edgar Brothers Company. Upon the further ground that the testimony as offered by the plaintiff is not sufficient to support a verdict in his favor, there being no showing that the milking machine caused any damage to the cows.'

The COURT.—I will overrule your motion. Exception granted."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

XXXV.

Said Court erred in sustaining the plaintiff's objection to defendant's testimony, as set forth in defendant's bill of exceptions, Exception Number 19, as follows:

"The WITNESS.—I have seen a Sharples' milking machine, and have seen them in operation. I have examined the udder of cows upon which the Sharples milking machine was being used. The last place I examined was at Westchester, at a dairy that is run at the experimental farm of the Sharples Separator Company. I was in Philadelphia this summer and went down there. I am not in the employ of the Sharples Separator Company. I simply went there to observe it.

Q. State what you observed in the condition of the udders of those cows. [361]

Mr. SWING.—We object to the question on the ground that the evidence as to how other machines worked is not admissible to show com-

pliance with the warranty; and we object to the question on the ground as incompetent, irrelevant and immaterial, how some other machine worked, and on the additional ground that no foundation has been laid.

The COURT.—I will sustain the objection as to the cows at Westchester, Pennsylvania.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

The following is the substance of the evidence rejected:

“The udders of those cows were in perfectly good condition, and free from disease and injury of any kind.”

XXXVI.

Said Court erred in sustaining plaintiff’s objection to the defendant’s testimony, as set forth in defendant’s bill of exceptions, Exception Number 20, as follows:

“Q. State whether or not during the year 1914 milk or any other dairy products from the Imperial Valley were permitted in the city of Los Angeles to be shipped here for consumption in Los Angeles City.

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial.”

Said objection was then and there sustained by said Court, to which ruling the defendant said Sharples Separator Company, then and there duly excepted, and now assigns said ruling as error.

The following is the substance of the evidence re-[362] jected: "No, sir."

XXXVII.

Said Court erred in overruling defendant's objection to the following question addressed on cross-examination to the witness Dr. George H. Hart, as set forth in defendant's bill of exceptions, Exception Number 21, as follows:

"Q. Doctor, assuming that the plaintiff in this case, in February, 1914, had a healthy herd of some 90 dairy cows, all of which had been entirely free from garget since the herd had been collected, that plaintiff then bought a Sharples mechanical milker, which was installed by an expert operator, furnished by the defendant company, who after installing the machine, instructed plaintiff, his son and hired man, in the care and operation of the milker and remained with plaintiff until he pronounced the machine properly installed and adjusted and plaintiff and his milkers proficient in the operation of the machine; that thereafter the machine was cared for and operated by the persons who had received instructions as aforesaid, and was cared for and operated in accordance with the instructions furnished by the defendant company; that after the milking machine had been so used on plaintiff's cows for about thirty days, said cows began developing swollen quarters; that the cows showing swollen quarters were promptly taken off of the milker and thereafter milked by hand, following which hand milking the

swelling rapidly disappeared and did not reappear in the affected quarters, or in any other quarter of that cow, so long as she was milked by hand, or in the udders of any other cow in the herd, being milked my hand; that the cows [363] which were being milked by hand were subjected to the same conditions of feed, water, quarters, exposure, surroundings, and handling as were the cows being milked by the milker, i. e., all the cows whether milked by the milker or by hand, were subjected at all times to the same identical conditions and surroundings, with the one exception, that one part were being milked by the milker and the other part were being milked by hand, that notwithstanding which the cows which were being milked by the milker continued to develop swollen quarters so long as the milker remained in operation upon them, while in those being milked by hand the existing swelling rapidly disappeared and did not reappear so long as they were milked by hand; that on the 25th day of June, 1914, the defendant, the Sharples Separator Company, sent its expert operator to plaintiff's ranch and he took charge of all the plaintiff's cows and of the milking machine and after thoroughly disinfecting the machine and the premises, began milking all of the plaintiff's cows with the milker, including those cows which had theretofore had swollen quarters; that in a very short time the swellings reappeared in the cows which had theretofore had it, in an aggravated form,

which became so intense in the case of about 17 cows, as to stop the passage of milk from the udders; that said expert operator stopped operating the machine about July 7th, 1914, and the milker was not again operated until about October 20, 1914; that in said interval all the cows were milked by hand and during that time no new cases of swollen quarters appeared; that on October 20, 1914, the milker was again begun by the same expert operator, who had operated from June 25th to July 7th, and he continued operating it [364] on about 30 cows up until December 20, 1914; that the cows on which said milker was so operated were cows selected by said operator and which had not theretofore shown any udder trouble; that during those two months, between 8 and 12 of the cows being milked by the milker developed swollen quarters, that of the 60 odd remaining cows of the herd being milked during the same period by hand, developed no new cases of swollen quarters; that the cows which were being milked by the milker and the cows that were being milked by hand during said period, were subjected at all times to the same identical conditions and surroundings with the one exception, that the one part were being milked by the milker and the other part were being milked by hand; that said expert operator stopped operating the same machine on December 20, 1914, and the same has not since been operated on any of plaintiff's cows; that plaintiff has never had any such case

or any similar case of swollen quarters in his herd before beginning the use of the milker and there has been no case of swollen quarters in his herd since the milking machine quit, would you say, under those circumstances, that the condition referred to in the question, the udder trouble of Skinner's cows, was caused by bacteria in the first place, or by some injury from the milking machine?"

Said objection was made upon the ground that said question was incompetent, irrelevant and immaterial, and that it assumed conditions not pertinent and not in evidence.

Said objection was overruled by said Court and said defendant then and there excepted to said ruling and now assigns said ruling as error.

Thereupon the witness testified as follows: [365]

"A. Just what is the question,—whether the trouble was caused by the milking machine, or whether it was caused by bacteria?

Mr. SWING.—Yes, sir; in the condition stated by my question.

A. The ultimate trouble was due to bacteria. The primary cause in this case, there being only part of the animals that were milked by the milking machine that were affected—is not that what your question said?

The COURT.—That is what he states in his question.

The WITNESS.—(Continuing.) That in this case the milking machine could have provided a condition in the udder in this percentage of ani-

mals which may have been easy milkers or hard milkers, and as the rules of the company show, should be handled under slightly different conditions, but they may not have been so handled, or they may have been so handled, but nevertheless the milking machine may have, under those conditions, produced a favorable field for these bacteria to multiply. They may have caused some kind of an injury, or some kind of a reduction of those tissues through the resistances which they ordinarily have. I am familiar with the instructions furnished by the Sharples Separator Company for the operation of their machine. I do not remember that I ever found in there any place where it said to boil the teat cups; it mentions putting them in an antiseptic solution, lime."

XXXVIII.

Said Court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, Exception Number 22, as follows:

"The COURT.—Now, if you operate this machine as [366] directed in this book, is it a successful machine? A. Yes.

Q. Would it hurt the cow's bag? A. No.

Mr. PARKE.—Now, just explain on what you base your answer to the question asked by the Court.

A. When the machines were installed in our herd, we had a book of instructions, and we followed it.

The COURT.—I don't care anything about your herd.

A. Well, those are the instructions.

Mr. PARKE.—Well, if the Court please, I insist that the witness has a right to give the reasons upon which he bases his answer, whether or not the machine is a success. He says it is a success, and he has a right to give the reasons upon which he bases that opinion.

Mr. SWING.—Our objections to the offer as it now stands are that it does not include any offer to show that the conditions under which this machine was operated were similar or identical with those under which the machine of the plaintiff was operated.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error.

XXXIX.

Said Court erred in sustaining plaintiff's objection to defendant's testimony as set forth in defendant's bill of exceptions, Exception Number 23, as follows:

"Q. State whether or not you got as much milk from a dairy herd of two hundred cows at the Shore Acres dairy as [367] you did from hand milking?

Mr. SWING.—We object to that; it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception."

And said defendant, said Sharples Separator

Company, a corporation, now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS.—A. Yes, sir.”

XL.

Said Court erred in sustaining the objection of said plaintiff to the offer of said defendant in evidence of the contract signed by Edgar Bros. Company by J. H. Edgar and marked “Defendant’s Exhibit No. 2” herein as set forth in said Bill of Exceptions, Exception Number 24.

To the ruling of said Court sustaining said objection, said defendant then and there duly excepted, and said defendant now assigns said ruling as error.

XLI.

Said Court erred in sustaining the objection of said plaintiff to the following question asked upon the direct examination of the witness Albert John Reed, as set forth in defendant’s bill of exceptions, Exception Number 25, as follows:

“Q. Were they the same kind of machines that the plaintiff W. W. Skinner was using near El Centro?”

Said objection was based upon the ground that said question was incompetent, irrelevant and immaterial and called for the conclusion of the witness.
[368]

To the ruling of said Court sustaining said objection, said defendant then and there duly excepted, and now assigns said ruling as error.

The following is the full substance of the evidence rejected:

“The WITNESS.—A. Yes, sir.

XLII.

Said Court erred in overruling defendant's objection to the plaintiff's testimony as set forth in defendant's bill of exceptions, Exception Number 26, as follows:

“Mr. SWING.—For whom did you install—for whom were you working when you installed the mechanical milker?

Mr. PARKE.—We object to that question on the ground it is not proper cross-examination, and was not called for in the direct examination.

The COURT.—Objection overruled.

Mr. PARKE.—Note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

“A. I was working for the Sharples Separator Company.”

XLIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in defendant's bill of exceptions, Exception Number 27, as follows:

“Q. How long have you been working for them approximately?” [369]

Said question was objected to upon the ground that it was not proper cross-examination, and was

not called for in the direct examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said rulings as error. Thereupon the witness testified as follows:

"A. I started to work for them on the first of June, 1913, and continued to work for them until January 15, 1915."

XLIV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination as set forth in defendant's bill of exceptions, Exception Number 28, as follows:

"Q. About how many dairies are you acquainted with down there?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. I am acquainted with some half a dozen down there."

XLV.

Said Court erred in overruling the objection of said defendant to the question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 29, as follows: [370]

"Q. Did you ever warn Skinner not to use water out of this water hole?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. When I went down in June and July I did.”

XLVI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions; Exception Number 30, as follows:

“Q. What was done?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Boiled water was used then; he followed my suggestion.”

XLVII.

Said Court erred in overruling said defendant's objection to the following question addressed to said witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 31, as follows: [371]

“Q. How many times were you there, at Skinner's place?”

Said objection was based upon the ground that

said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Well, I have been there a dozen times, off and on. I was there first in the first part of February, and remained for twelve or fourteen days. The occasion of my being there at the time was to install a mechanical milker. I was next there in the latter part of March, or the first of April.”

XLVIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 32, as follows:

“Q. About how long were you there at that time ”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Two or three milkings.”

XLIX.

Said Court erred in overruling the objection of said defendant to the following question addressed to the [372] witness Albert J. Reed, on cross-examination, as set forth in defendant’s bill of ex-

ceptions, Exception Number 33, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Trouble.”

L.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 34, as follows:

“Q. What was the trouble?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Skinner’s trouble with his cows.”

LI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 35, as [373] follows:

“Q. What was the occasion of your being called in?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I was the expert in charge.”

LIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 36, as follows:

“Q. An expert in charge for whom?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Sharples Separator Company.”

LIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 37, as follows:

“Q. How long were you there at that time?”

[374]

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which rul-

ing said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I was there a couple of days, anyhow.”
LIV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 38, as follows:

“Q. And when were you next there, if you remember?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. June 25th to July 7th.”
LV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 39, as follows:

“Q. What was the occasion of your being there that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

[375]

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and

now assigns said ruling as error. Thereupon the witness testified as follows:

"A. Skinner stopped his machine and I was sent for to restart it."

LVI.

Said Court erred in receiving in evidence and in refusing to strike out the following answer given by said witness Albert J. Reed to the question:

"Q. What was the occasion of your being there at that time," addressed to said witness on cross-examination, as set forth in said defendant's bill of exceptions, Exceptions Numbered 39 and 40 as follows:

"A. Skinner stopped his machine and I was sent for to restart it."

Said motion to strike out was then and there denied by said Court, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LVII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 41, as follows:

"Q. You say you were sent to Skinner's place —by whom were you sent?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling [376] said defendant then and there duly excepted, and now assigns said ruling as error. There-

upon the witness testified as follows:

“A. The Sharples Separator Company.”

LVIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 42, as follows:

“Q. When next were you there?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. October 20th to December 20th.”

LIX.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 43, as follows:

“Q. What was the occasion of your being there at that time?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns [377]. said ruling as error. Thereupon the witness testified as follows:

“A. To take charge of the mechanical milker.
I was working at that time for the Sharples

Separator Company. While there on the Skinner ranch at that time I operated the milker."

LX.

Said Court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 44, as follows:

"A. To take charge of the mechanical milker. I was working at that time for the Sharples Separator Company. While there on the Skinner ranch at that time, I operated the milker."

Said Court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

LXI.

Said Court erred in receiving in evidence, over the objection of said defendant that the same was not proper cross-examination, the following portion of the testimony of said witness Albert J. Reed as given on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 45, as follows:

"The WITNESS. — (Continuing.) Cows were milked by hand when I went there on my second visit; there were two or three that had swollen quarters, that were being milked by hand. On my third visit, some half-dozen cows, perhaps, [378] were being milked by hand.

When I got there in June they were all being milked by hand. They had quit using the milker and I started it again."

Said Court overruled said objection of said defendant, to which ruling said defendant then and there duly excepted, and now assigns the same as error.

LXII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 46, as follows:

"Q. After that, were any of the cows taken off for any reason and milked by hand?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. Some dozen or so were taken off and milked by hand, and six or eight were isolated. I was in charge at that time, and this was done under my instruction."

LXIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 47, as follows:

"Q. For what reason?" [379]

Said objection was based upon the grounds, that it is not proper cross-examination, and is asking for the opinion and conjecture of the witness, and not for a statement of fact.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The condition of the cows warranted it.”

LXIV.

Said Court erred in receiving in evidence and in refusing to strike out the answer of the witness Albert J. Reed to the question, “Q. For what reason,” addressed to said witness on cross-examination as set forth in said defendant’s bill of exceptions, Exception Numbered 47 and 48, as follows:

“A. The condition of the cows warranted it.”

Said motion to strike out was made upon the ground that said answer of said witness to said question was not responsive.

Said Court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXV.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 49, as follows:

“Q. What was the condition of the cows?”

[380].

Said objection was based upon the grounds that

said question was incompetent, irrelevant and immaterial, not proper cross-examination, and asking for the opinion and conjecture of the witness, and not a statement of fact.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. The whole udder was swollen, there was high fever and individual cows were in very bad condition.”

LXVI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed, on cross-examination, as set forth in said defendant’s bill of exceptions, Exception Number 50, as follows:

“Q. How soon did this condition appear after you had started the milker upon them?”

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

“A. Directly.”

LXVII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said [381] defendant’s bill of exceptions, Exception Number 51, as follows:

"Q. After you started the milker on that string of 30, were any taken off and milked by hand?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. Some two or three during the first two weeks, and then one or two as warranted, later on."

LXVIII.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 52, as follows:

"Q. Why was the milker taken off these cows?"

Said objection was based upon the grounds that said question was not proper cross-examination, not having been brought out in a direct examination, and calling for the conjecture of the witness, and not for a statement of facts.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. Owing to swollen quarters."

LXIX.

Said Court erred in overruling the objection of

[382]. said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 53, as follows:

"Q. I will ask you if Skinner was getting as much milk in quantity in December when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. In my opinion he was not."

LXX.

Said Court erred in receiving in evidence and in refusing to strike out the answer of said witness Albert J. Reed to the question: "I will ask you if Skinner was getting as much milk in quantity in December, when you quit, as he was in February, when the milking machine was started on these cows, from those on which the milking machine had been used," addressed to said witness on cross-examination, as set forth in said defendant's bill of exceptions, Exceptions Numbered 53 and 54, as follows:

"A. In my opinion, he was not."

Said motion to strike out was based upon the ground that said answer was not responsive, and was not based upon a statement of facts.

Said Court denied said motion, to which ruling said [383] defendant then and there duly excepted, and now assigns said ruling as error.

LXXI.

Said Court erred in overruling the objection of said defendant to the following question addressed to the witness Albert J. Reed on cross-examination, as set forth in said defendant's bill of exceptions, Exception Number 55, as follows:

"Q. And some quit giving milk in one quarter, and some in more quarters?"

Said objection was based upon the ground that said question was not proper cross-examination.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. Yes."

LXXII.

Said Court erred in granting the motion of said plaintiff to strike out from the cross-examination of the witness Frederick A. Frank, the following language as set forth in said defendant's bill of exceptions, Exception Number 56, as follows:

"And I believe that Reed notified Skinner of this fact, too."

To said ruling of said Court striking out said passage from said cross-examination of said witness, said defendant then and there duly excepted, and now assigns said ruling as error. [384]

LXXIII.

Said Court erred in receiving in evidence, and in

refusing to strike out from the direct examination of the witness, C. F. Boarts, as set forth in said defendant's bill of exceptions, Exception Number 57, the following language:

“He had a very good dairy house.”

Said motion was made upon the ground that said answer of said witness was a conclusion of the witness.

Said Court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXXIV.

Said Court erred in sustaining plaintiff's objection to H. D. Nye's testimony, as set forth in defendant's bill of exceptions, Exception Number 58, as follows:

“Q. Is it not a fact, Mr. Nye, that dairy conditions in the Imperial Valley during the year 1914, or during the time when you were State dairy inspector down there, were such that milk and dairy products were not permitted to be shipped from Imperial Valley into Los Angeles city for consumption?

Mr. SWING.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination

The COURT.—Objection sustained.

Mr. PARKE.—Note an exception.”

The said defendant, said Sharples Separator Company, a corporation, assigns said ruling as error. The following is the substance of the evidence rejected:

The WITNESS.—“Yes, sir.” [385]

LXXV.

Said Court erred in receiving in evidence and in refusing to strike out from the cross-examination of Dr. V. E. Cram, as set forth in said defendant's bill of exceptions, Exception Number 59, the following passage:

"I found pus in the teats of the cows; that indicates the presence of a germ. There are not two or three kinds of germs—noninfectious and infectious germs. The presence of pus indicates the presence of a germ; this germ was not an infectious germ; it is not a contagious germ. I did not make any bacteriological test of the germs from Skinner's cows. As to whether they were not staphylococci, streptococci or micrococci, which by the better authorities are held to be infectious. I presumed it was staphylococcus; I presumed it was; my opinion is a presumption, and I made no bacteriological or chemical analysis."

Said motion was based upon the ground that the answers of said witness as to causes were incompetent, as they appear as mere presumptions on his part.

Said Court denied said motion, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error.

LXXVI.

The Court erred in overruling defendant's objection to plaintiff's testimony as set forth in defendant's bill of exceptions, Exception Number 60, as follows:

"Q. Doctor, assuming that a herd of dairy cows were being milked, one string by a Sharples mechanical milker, and another string by hand, and that the only cases of swollen quarters to appear in the herd appeared among the cows milked [386] by the mechanical milker, and that when the condition so appeared the affected cows were taken off the milker and milked together with other cows, then being milked by hand, not being isolated, and that the milkers did not wash their hands between cows, that the cows milked by hand got well, and the swollen quarters did not spread to a single other cow being milked by hand. What would you say as to what was the cause of the swollen quarters?

Mr. PARKE.—We object to the question as assuming only a partial statement by the uncontradicted facts as presented by the evidence, it appearing clearly from the evidence that there was present in the milk from Skinner's cows certain germs designated as staphylococci, and it would be unfair to ask the witness the cause of such condition, without setting forth that condition. And, further, nothing is said about the manner in which the milking machine was operated.

The COURT.—Well, I overrule the objection.

Mr. PARKE.—Note an exception."

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon the witness testified as follows:

"A. I would believe the teats there were being bruised by the milker. I would not say, under

the conditions stated in the question, that the swollen quarter was an infectious condition. I think that the cup on this teat has bruised the quarter. The reason I think so was because there was no spreading of the disease there originally, and as soon as they took the teat cup off and went to milking these cows by hand, why, the trouble disappeared. The primary cause, [387] in my opinion, of the condition stated was the bruising of the teat cup—or the teat by the teat cup."

LXXVII.

Said Court erred in overruling the objection of said defendant to the following question addressed on direct examination to the witness A. G. McCulloch, as set forth in said defendant's bill of exceptions, Exception Number 61, as follows:

"Q. What are some of the causes of mammitis, if you can say?"

Said objection was based upon the ground that said question called for an expert opinion of the witness, no foundation having been laid therefor.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. Any injury inflicted upon the cow's udder will cause an inflammation. I know the general difference between infectious mammitis and non-infectious mammitis."

LXXVIII.

Said Court erred in overruling the objection of said

defendant to the following question addressed to said witness A. G. McCulloch, on direct examination, as set forth in said defendant's bill of exceptions, Exception Number 62, as follows:

"Q. I will ask you whether, in your opinion, noninfectious mammitis can be caused by the use of a Sharples Mechanical Milker in milking cows."

Said question was objected to as calling for a conclusion, [388] no proper foundation having been laid, and as incompetent, irrelevant and immaterial, and because the circumstances and conditions under which the operation of the machine might be made were not stated in the question.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and now assigns said ruling as error. Thereupon the witness testified as follows:

"A. It can."

LXXIX.

Said Court erred in overruling the objection of said defendant to the following question addressed on direct examination to said witness A. G. McCulloch, as set forth in said defendant's bill of exceptions, Exception Number 63, as follows:

"Q. Did you follow them in operating the milker?"

Said objection was based upon the ground that said question called for a conclusion of the witness.

Said Court overruled said objection, to which ruling said defendant then and there duly excepted, and

now assigns said ruling as error. Thereupon the witness testified as follows:

“A. I did.”

LXXX.

Said Court erred in overruling defendant’s objection to plaintiff’s testimony, as set forth in defendant’s bill of exceptions, Exception Number 64, as follows:

“Q. I will ask you whether, in your opinion, the Sharples mechanical milker can be operated upon dairy cows in the Imperial Valley without seriously injuring some of [389] them?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, no foundation having been laid, incompetent, irrelevant and immaterial, and presuming a state of facts not proven in this case at issue.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.”

And said defendant, said Sharples Separator Company, now assigns said ruling as error. Thereupon the said witness testified as follows:

“A. No, it cannot.”

LXXXI.

Said Court erred in overruling defendant’s objection to plaintiff’s testimony, as set forth in defendant’s bill of exceptions, Exception Number 65, as follows:

“Q. What, in your opinion, would be the effect upon a string of dairy cows, if milked any considerable length of time with a Sharples mechanical milker, even though all the instructions

furnished by the company were strictly followed?

Mr. PARKE.—We object to the question as calling for an expert opinion of the witness, presuming a state of facts not proven in this case, and incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. PARKE.—We note an exception.”

And said defendant, said Sharples Separator Company, a corporation, now assigns said ruling as error. Thereupon said witness testified as follows:

“A. It would eventually kill the cows if persisted in. [390] It would develop an inflammation, and the inflammation would only be increased and aggravated by the use of the machine, if persisted in.”

LXXXII.

Said Court erred in refusing to give to the jury the Instruction No. II as requested by the defendant and as set forth in defendant’s bill of exceptions, Exception Number 66, as follows:

“If you believe from all the evidence that the plaintiff’s cows were injured by the use of the milking machine furnished by the defendant, Sharples Separator Company while being operated in strict accordance with the instructions given to the plaintiff by the defendant, then you are instructed that the full measure of plaintiff’s damage is the difference between the value of the cows before they were injured, and the value immediately after such injury resulted, and if such damage be allowed plaintiff is not entitled to

recover anything additional for care or keep of said cows, or for loss of butter fat therefrom."

Which said Instruction No. II said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.
[391]

LXXXIII.

Said Court erred in refusing to give to the jury instruction No. III as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 67, as follows:

"You are instructed that the plaintiff is not entitled to any claim for damages for loss of butter fat."

Which said Instruction No. III, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXIV.

Said Court erred in refusing to give to the jury instruction No. IV as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 68, as follows:

"There is no evidence before the Court as to the value of the pasturage claimed by plaintiff, and plaintiff cannot recover therefor."

Which said instruction No. IV said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the [392] presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXV.

Said Court erred in refusing to give to the jury Instruction No. VII as requesterd by defendant and as set forth in defendant's bill of exceptions, Exception No. 69, as follows:

"If, from all the evidence, you believe that the plaintiff's cows had infectious mammitis, or any other infectious disease of the udder, and that such disease contributed to, or caused any part, or all, of the injury to the cows claimed to have been injured, then you are instructed that the defendant, Sharples Separator Company, cannot be held liable in damages to the plaintiff for such injury resulting from such diseased condition."

Which said instruction No. VII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected *said instruction to* said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVI.

Said Court erred in refusing to give to the jury Instruction No. IX as requested by defendant and as set forth in defendant's bill of exceptions, Exception No. 70, as follows: [393]

"If you believe, from all the evidence, that plaintiff's cows had infectious mammitis, or other disease of the udder, and that with knowledge of the diseased condition the plaintiff used, or permitted the milking machine purchased from defendant Sharples Separator Company to be used upon the cows so diseased, you are instructed that the defendant Sharples Separator Company is not liable for the injury resulting from the use of the machine upon cows so diseased."

Which said Instruction No. IX, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVII.

Said Court erred in refusing to give to the jury Instruction No. XI, as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 71, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows which

resulted in the injury complained of by him, was a traumatic, noninfectious disease of the udder, known as ordinary garget, and that the permanent injury [394] to plaintiff's cows as claimed by him resulted from a lack of proper care and treatment of said cows by the plaintiff, then you are instructed that the defendant Sharples Separator Company cannot be held responsible for any injury or damage which might have been prevented by the proper treatment of the injured cows by the plaintiff."

Which said Instruction No. XI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and in said ruling of said Court, refusing to give said instructions to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

LXXXVIII.

Said Court erred in refusing to give to the jury Instruction No. XII as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 72, as follows:

"You are instructed that your verdict in this case should be in favor of the defendant Sharples Separator Company."

Which said Instruction No. XII, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury,

the said defendant, in the presence of said jury and before it retired to consider its [395] verdict, then and there duly excepted and now assigns said ruling as error.

LXXIX.

Said Court erred in refusing to give to the jury Instruction No. XIV as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 73, as follows:

"If you believe, from all the evidence, that any part or all of the damage to plaintiff's cows, from whatever cause, resulted from a lack of prompt, proper and careful treatment of said cows by the plaintiff, then you are instructed that for all such resulting damage the defendant, Sharples Separator Company, is not liable."

Which said Instruction No. XIV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

XC.

Said Court erred in refusing to give to the jury Instruction No. XV, as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 74, as follows:

"If you believe, from all the evidence, that the death of the three cows, and the [396] diseased condition of the udders of the other

twenty-four cows, resulted from the invasion into the udders of these cows of an infectious disease, then the defendant in this case is not liable to the plaintiff for such damage."

Which said instruction No. XV, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted and now assigns said ruling as error.

XCI.

Said Court erred in refusing to give to the jury Instruction No. XVI, as requested by defendant and as set forth in defendant's bill of exceptions, Exception Number 75, as follows:

"If you believe, from all the evidence, that the diseased condition of plaintiff's cows resulted from the negligent or improper use by him of the milking machine purchased from the defendant, then you are instructed that the defendant Sharples Separator Company is not liable for such damage."

Which said Instruction No. XVI, said Court then and there refused to give to said jury, and in failing so to instruct and charge said jury, said Court misdirected [397] said jury; and to said ruling of said Court, refusing to give said instruction to said jury, the said defendant, in the presence of said jury and before it retired to consider its verdict, then and

there duly excepted and now assigns said ruling as error.

XCII.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 76, as follows:

"This is an action brought by plaintiff to recover damages for injuries and losses suffered by him as a result of the operation of a Sharples mechanical milker upon his herd of dairy cows. Plaintiff alleges that defendant sold him a Sharples mechanical milker and warranted the same to be fit and proper for milking plaintiff's dairy cows and represented that if the same was operated according to its instructions it would not injure his cows or decrease the amount of milk received from them. Plaintiff further alleges that said mechanical milker was operated according to the instruction furnished by the Sharples Separator Company, but that it both seriously injured his cows and decreased the amount of milk given by them. These allegations are denied by the defendants and it is for you to decide whether or not they are true. If you find from this evidence that they are true, it is your duty to return a verdict for the plaintiff for such damages as it is shown plaintiff has sustained, as alleged in [398] the complaint, and under the rule of damages which I give you for assessing damages; and I might say here to you, gentlemen, that while Edgar Brothers was sued in this complaint they are no more a party

to this action, because as to them the action was dismissed."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCIII.

The Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 77, as follows:

"The evidence in this case shows that plaintiff operated the milker which he purchased from defendant or permitted the same to be operated on all or some of his cows from about February 7, 1914, to July 7, 1914, and again from October 20th, 1914, to December 20th, 1914. Plaintiff claims that within about a month after the milker was started his cows began suffering from the effects of its operation and that his cows were injured as long as the milker was operated.

"If you find from the evidence that the plaintiff's cows were so injured by the operation of said milker you are to allow his damages in the sum which would be a fair compensation for the loss incurred by an effort in good faith to use the [399] machine for milking plaintiff's cows. In considering plaintiff's good faith in continuing the use of the milker and permitting it to be started again after it had once been stopped, you are to consider all the circumstances surrounding the operation of the milker,

including the representations made by the defendant company and its employees.

"The word 'fair' used in this instruction to describe the compensation to which plaintiff may be entitled is not used by me to mean something less than 'full' or 'complete' compensation; it is used rather in the sense of 'just.' "

And the defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCIV.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 78, as follows:

"The jury are instructed at the time the Sharples Separator Company sold the mechanical milker to plaintiff, the said the Sharples Separator Company guaranteed the machine to be in all respects as represented in its printed matter and to be capable of doing the work claimed therein. Plaintiff has offered in evidence a number of printed documents which he says were delivered to him by the Sharples Separator Company during the [400] negotiations leading up to the sale to him of the Sharples mechanical milker. These contained various statements regarding the Sharples Mechanical Milker, and what it will do, and it is for you to decide from all the evidence whether the warranty has been performed."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCV.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 79, as follows:

"You are instructed that the only warranty given to the plaintiff by the defendant Sharples Separator Company which is to be considered by you is the warranty contained in the original order, being Plaintiff's Exhibit 1, introduced in evidence; and you can take that with you to the jury-room, gentlemen, or any other exhibit you desire.

"You are instructed that, under the law of California, a detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that [401] time.

"Also that the detriment caused by the breach of warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which I have just specified, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCVI.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 80, as follows:

"The jury are instructed that if you find from the evidence that there was a warranty that the Sharples mechanical milker sold plaintiff would milk his cows without injury and you also find that the warranty was broken, you should allow plaintiff damages for all injuries which are the approximate result of the operation of said milker upon said cows while the machine was being operated by plaintiff or his help in conformity with instructions furnished by the defendant company, and also damages for all injury done by the milker while being operated by the employee or agent of the defendant company, if you find any time it was so operated by an employee or agent of the [402] defendant company."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCVII.

Said Court erred in giving the following instruc-

tion to the jury as set forth in defendant's bill of exceptions, Exception Number 81, as follows:

"If you believe from all the evidence that plaintiff's cows were injured by the use of the milking machine furnished by the defendant, while being operated in strict accordance with the instructions given to the plaintiff by the defendant, or while being operated by the defendant, upon the plaintiff's cows, then the plaintiff is entitled to recover such damages as are shown by the evidence to have been the proximate result of injuries caused by said machine."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

XCVIII.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 82, as follows:

"In estimating the value of the cows [403] that were injured the true measure of such damage is the value of said cows before they were injured and the value after such injury resulted. And in speaking of value, gentlemen, I am speaking of the market value of the cows."

And said defendant, in the presence of said jury and before it retired to consider its verdict, then and there duly excepted to said instructions and now assigns as error the giving of said instruction to said jury by said Court.

XCIX.

Said Court erred in giving the following instruction to the jury as set forth in defendant's bill of exceptions, Exception Number 83, as follows:

"You must not allow a duplication of damages. That is to say, you must not allow for the value of the cow and also for the value of the butter fat that she might have given after his loss, and I give you these rules to govern you in allowing the damages:

"1st: Where a cow died, you shall allow for the use of the cow, that is to say, for the loss of the butter fat which the plaintiff sustained by reason of the injury to the cow until the time of her death; then allow for the value of the cow if she had not been injured.

"2d: Where a cow was permanently injured and destroyed as a milk cow, you shall allow for the loss of the butter fat from the time she was injured for a reasonable length of time to determine that the cow would be of no [404] further service as a milk cow and until she was well enough to be disposed of for beef; then allow the difference between the value of the cow before she was injured and the value of the cow for beef.

"3d: Where a cow was not destroyed as a milk cow, but permanently injured, you shall allow for loss of butter fat during the time she was injured so that she gave a less quantity of milk, then consider the amount of damage that was done to the cow, that is to say, the value of the

cow before her injury, and the value of the cow as a milk cow after her injury.

“4th: Where a cow was not permanently injured, but was only injured for a time, you shall allow for loss of butter fat during the time she was injured and did not give her normal amount of milk.

“5th: If the machine did not produce as much milk when being used as if said cows had been milked by hand, and there was in consequence a loss of butter fat, you can take that into consideration and allow for such loss of butter fat.

“In determining the loss of the use of the cow that is shown by the loss of butter fat, you should take into consideration the expense of keeping the cow, and not allow expense of pasturage and also loss of use of cows.”

Said defendant, in the presence of said jury and before it retired to consider its verdict, then and there [405] duly excepted to said instruction and now assigns as error the giving of said instruction to said jury by said Court.

C.

Said Court erred in permitting to be rendered and in receiving the verdict of the jury in the above-entitled action; and to said verdict, and to the action of said Court in permitting to be rendered and in receiving said verdict, said defendant then and there, upon the announcement of said verdict duly excepted, and now assigns said verdict and the action of said Court thereon as error.

CI.

Said Court erred in giving, making, rendering, entering and filing its judgment in the above-entitled action in favor of the above-named plaintiff and against the above-named defendant.

CII.

Said Court erred in not giving, making, rendering, entering and filing its final judgment in the above-entitled action in favor of the above-named defendant and against the above-named plaintiff.

CIII.

Said Court erred in giving making, rendering, entering and filing its final judgment in the above-entitled action in favor of said plaintiff and against said defendant upon the pleadings and record in said action.

CIV.

Said Court erred in giving, making, rendering, entering, and filing its final judgment in said action in favor of said plaintiff and against said defendant, in this, that said final judgment was and is contrary to law and to the [406] cause made and facts stated in the pleadings and record in said action.

In order that the foregoing assignments of errors may appear of record, said defendant presents the same to said Court, and prays that such disposition be made thereof as is in accordance with law and the Statutes of the United States in such cases made and provided; and said defendant, plaintiff in error herein, prays the reversal of the above-mentioned final judgment heretofore given, made, rendered, entered

and filed in the above-entitled court, in the above-entitled action.

Dated Los Angeles, California, A. D. 1917, February 13th.

THE SHARPLES SEPARATOR COMPANY, a Corporation.

Said Defendant, and Plaintiff in Error Herein.

By WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
J. J. DUNNE,

Its Attorneys.

United States of America,
Southern District of California,—ss.

We, the undersigned, attorneys for the above-named defendant, plaintiff in error herein, do hereby certify that the foregoing assignments of errors is made on behalf of said defendant, plaintiff in error herein, and is [407] in our opinion well taken, and the same now constitutes the assignments of error upon the writ prayed for.

Dated Los Angeles, California, this 13th day of February, A. D. 1917.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
J. J. DUNNE,

Attorneys for said Defendant, and Plaintiff in Error
Herein.

Received a copy of the foregoing Assignments of Errors this 17 day of February, A. D. 1917.

PHIL D. SWING,
Attorney for the Above-named Plaintiff, and Defendant in Error Hercin.

[Endorsed]: Original. No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Assignment of Errors. Filed Feb. 23, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, J. J. Dunne, Attorneys for Defendant. [408]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Order Allowing Writ of Error.

At a stated term, to wit, the January Term. A. D. 1917, of the above-entitled court, held at its court-room at the city of Los Angeles, in the State of California, on the 26th day of February, A. D. 1917.

Present: The Honorable OSCAR A. TRIPPET,
Judge of Said Court.

Upon the petition of The Sharples Separator Company, a corporation, and on motion of its counsel:

It is hereby ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit at the city and county of San Francisco, State of California, from the final judgment heretofore given, made, filed and entered in and by the above-named court, in the above-entitled cause, upon the issues therein joined, under date of October 13th, A. D. 1916, be, and the same is hereby allowed; and that a certified transcript of the record, testimony, exhibits, stipulations, bill of exceptions, and all proceedings herein, be forthwith transmitted to said [409] United States Circuit Court of Appeals, for the Ninth Circuit. It is further ordered that upon the filing by the defendant and plaintiff in error of a good and sufficient bond on writ of error, approved by this Court, in the sum of Five Thousand Dollars, all further proceedings in this court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Los Angeles, California, 2/27, A. D. 1917.

OSCAR A. TRIPPET,
Judge of said Court.

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Order Allowing Writ of Error. Filed Feb. 27, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles,

Cal., Telephones: A-2762, Main 5166, J. J. Dunne,
Attorneys for Defendant. [410]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, The Sharples Separator Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto the defendant in error, W. W. Skinner, in the full and just sum of Five Thousand Dollars (\$5,000), to be paid to said defendant in error, his certain attorneys, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents. Sealed with our seals and dated this 15 day of February, A. D. 1917.

WHEREAS, lately at a District Court of the United States, in *and Ninth* Judicial Circuit, in and for the Southern District of California, Southern Division, in [411] a suit depending in said court

between W. W. Skinner, as plaintiff, and The Sharples Separator Company, a corporation, as defendant, a judgment was rendered against said defendant, and said defendant having obtained a writ of error and filed a copy thereof in the Clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to said plaintiff, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city and county of San Francisco, State of California, in said Circuit, on the 26th day of March, A. D. 1917:

Now, the condition of the above obligation is such that if the said defendant shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else, to remain in full force and virtue.

THE SHARPLES SEPARATOR COMPANY, a Corporation.

By W. J. WOLFORD,

Its Manager.

UNITED STATES FIDELITY & GUARANTY COMPANY.

[Seal]

By W. H. SCHRODER,

Its Attorney in Fact. [412]

State of California,

City and County of San Francisco,—ss.

On this 15th day of February, in the year one thousand nine hundred and seventeen, before me, E. J. Casey, a notary public in and for said city and county, residing therein, duly commissioned and

sworn, personally appeared W. J. Wolford, known to me to be the manager of the Sharples Separator Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the city and county of San Francisco, the day and year last above written.

[Seal]

E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires August 18, 1919.

State of California,
County of Los Angeles,—ss.

On this 16th day of February, in the year one thousand nine hundred and 17, before me, J. St. Paul White, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared W. H. Schroder, known to me to be the duly authorized attorney in fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said W. H. Schroder duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact. [413]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] J. ST. PAUL WHITE,

Notary Public in and for Los Angeles County, State
of California.

The foregoing bond is hereby approved.

OSCAR A. TRIPPET,

Judge.

_____,

_____,

Attorneys for said Plaintiff and Defendant in
Error.

[Endorsed]: No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Bond on Writ of Error. Filed Feb. 27, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, J. J. Dunne, Attorneys for Defendant. [414]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: You will please prepare transcript of record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the writ of error heretofore issued out and perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Writ of Error.
2. Citation on Writ of Error and Acknowledgment of Service.
3. Amended Petition for Removal.
4. Bond on Removal.
5. Plaintiff's Original Complaint.
6. Plaintiff's Amended Complaint.
7. Plaintiff's Amendment to Amended Complaint.
8. Answer of Sharbles Separator Company to Amended Complaint.
9. Amended Answer of Edgar Bros. Company.

10. Verdict. [415]
11. Judgment-roll and Certificate thereto.
12. Bill of Exceptions and Order Allowing Same.
13. Stipulation filed and order made on October 21st, 1916, extending time within which defendant might file Bill of Exceptions.
14. Stipulation filed and order entered on November 20, 1916, extending time with which defendant might file Bill of Exceptions.
15. Stipulation filed and order entered on December 23d, 1916, extending time within which defendant might prepare and file Bill of Exceptions.
16. Stipulation filed and order entered on January 26th, 1917, extending time for settling Bill of Exceptions.
17. Minute Order entered on January 26th, 1917, extending time for settling Bill of Exceptions.
18. Minute Order entered February 6, 1917, extending defendant's time to have Bill of Exceptions settled and allowed.
19. Objections by plaintiff to presentation, settlement and signing of Bill of Exceptions, filed on February 6th, 1917.
20. Petition for Writ of Error.
21. Assignments of Error.
22. Order Allowing Writ of Error and Supersedeas.
23. Bond on Writ of Error and Supersedeas.
24. This Praeclipe.

Said transcript to be prepared as required by law and the rules of said Court, and the rules of the United States Circuit Court of Appeals for the Ninth

Circuit, and filed in the office of the clerk of the United States Circuit Court of [416] Appeals before the 26th day of March, A. D. 1917.

Dated Los Angeles, California, this 8th day of March, A. D. 1917.

THE SHARPLES SEPARATOR COMPANY, a Corporation,

Plaintiff in Error.

WILLARD P. SMITH,
BICKSLER, SMITH & PARKE,
J. J. DUNNE,

Attorneys for said Plaintiff in Error.

[Endorsed]: Original. No. 413—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. W. W. Skinner, Plaintiff, vs. The Sharples Separator Company, a Corporation, Defendant. Praeclipe. Filed Mar. 8, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Willard P. Smith, Bicksler, Smith & Parke, 829 Citizens Natl. Bank Bldg., Fifth & Spring Sts., Los Angeles, Cal., Telephones: A-2752, Main 5166, J. J. Dunne, Attorneys for Defendant. [417]

*In the District Court of the United States of America,
in and for the Southern District of California,
Southern Division.*

No. 413—CIVIL.

W. W. SKINNER,

Plaintiff,

vs.

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing four hundred and seventeen typewritten pages, numbered from 1 to 417, inclusive, and comprised in one volume, to be a full, true and correct copy of the judgment-roll, stipulations and orders extending time to file bill of exceptions, objections by plaintiff to presentation, settlement and signing of bill of exceptions, bill of exceptions, petition for writ of error, assignments of errors, order allowing writ of error and supersedeas, bond on writ of error and supersedeas and praecipe for record on writ of error in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the said praecipe filed in my office on behalf of the plaintiff in error by its attorney of record.

I do further certify that the cost of the foregoing

record is \$222.25, the amount whereof has been paid me by [418] The Sharples Separator Company, a corporation, the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, this 21st day of April, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-first.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California. [419]

[Endorsed]: No. 2978. United States Circuit Court of Appeals for the Ninth Circuit. The Sharples Separator Company, a Corporation, Plaintiff in Error, vs. W. W. Skinner, Defendant in Error. Transcript of Record, Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed April 30, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

THE SHARPLES SEPARATOR COMPANY, a
Corporation,

Plaintiff in Error,

vs.

W. W. SKINNER,

Defendant in Error.

**Order Extending Time to May 15, 1917, to File
Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered, that the time within which the plaintiff in error in the above-entitled action may file record and docket cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to and including the 15th day of May, 1917.

Los Angeles, California, March 22, 1917.

TRIPPET,
District Judge.

[Endorsed]: No. 2978. United States Circuit Court of Appeals for the Ninth Circuit. The Sharples Separator Company, Plaintiff in Error, vs. W. W. Skinner, Deft. in Error. Order Extending Time to May 15/17 to File Record. Filed Mar. 26, 1917. F. D. Monckton, Clerk. Re-filed Apr. 30, 1917. F. D. Monckton, Clerk.

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